A PANORAMA

of the

WORLD'S LEGAL SYSTEMS

by

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IN THREE VOLUMES
WITH FIVE HUNDRED ILLUSTRATIONS

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THE
JAPANESE
LEGAL SYSTEM

Prologue to Chapter VIII

The legal systems described in the foregoing chapters all arose prior to the Christian era.

Following the chronological order of origin, the next in time were the Germanic and the Keltic systems (for although these two do not appear in written records until several centuries after the Christian era opened, there can be no doubt, especially for the Keltic, that their legal ideas were well developed in tradition and custom before the Christian era).

Nevertheless, the subsequent story of their development links them so closely with the later European systems that the narratives of all can best be placed together in sequence.

At this point, then, we may digress to describe the two remaining Oriental systems (Japanese, Chap. VIII, and Mohammedan, Chap. IX), whose origins come next in date; leaving the Keltic (Chap. X) and the Germanic (Chap. XII) to take their natural place in the European story.

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VIII. 1—Map of Feudal Japan

VIII

The Japanese Legal System

THE islands of Japan form, for the continent of Asia, almost the counterpart of the British Isles and the continent of Europe.[1] Racially, and legally also, the two have their analogies; for each was settled in succession by several races, and each shared in an imported continental civilization, so that no separate and indigenous legal system arose until late in their history, and then only because of their insular isolation and spirit of independence.

Four periods in Japanese legal history may be distinguished: (I) from A. D. 500 to A. D. 1200; (II) A. D. 1200-1600; (III) A. D. 1600-1850; (IV) The present century.

(I) First Period

1. The islands were invaded, before the Christian era, by two different streams of immigrants, not Chinese, coming in succession from the Manchurian and the Malayan regions,—much as the Kelts and the Germanics in turn entered and occupied Britain. These immigrant peoples had a strong clan and family structure, which lasted into modern times; and they made their way, like all peoples of that period, by militant force. After several centuries of struggle and settlement, a period of organized

political dominion arrived. In the A. D. 300's writing had been brought from China; in the 600's, the extant historical records begin. The Buddhist religion[3] and the Confucian morality now came from China in overwhelming waves,—much as Patrick was bringing the Christian gospel and Latin letters to Ireland, at almost the same moment in the world's history (*post*, Chap. X). A centralized royal power develops. The texts of royal edicts begin, embodying the new religion, the new philosophy of government, and the new arrangements for land-tenure, taxation, and justice.

VIII. 2—Buddhist Temple-Tower at Ikegami

VIII. 3—Shotoku Taishi
The first legislator-prince. The figures on either side are his two sons

2. *Earliest Laws*

2. In this period (A. D. 600-1200) comes the first constructive pronouncement of law (A. D. 604)—the Jushichi Kempo, or Seventeen Maxims, of the royal prince-regent Umayado, afterwards known as Shotoku Taishi (or, Prince of Saintly Morals) for his leadership in Buddhism, and as Togoto-mimi (or, Master Prince of the Law) for his leadership in justice.[8] The tradition about him is that he was able to speak at birth; and that when he grew up he was so wise that he could attend to the suits of ten men at once and decide them all without error. When Shotoku died (A. D. 621) "all the nobles and people of the kingdom filled the highways with the sound of their lamenting,—the old, as if they had lost a dear child, had no taste for salt and food in their mouths, the young, as if they had lost a beloved parent . . . . . The farmer ceased from his plough, and the pounding woman laid down her pestle. They all said:—'The sun and moon have lost their brightness; heaven and earth have crumbled to ruin: henceforward, in whom shall we put our trust?'"[a]

The Seventeen Maxims of Shotoku, however, like the Ten Commandments of the Hebrews, are essentially not rules of law, but a short code of political and social morality. Politically they foreshadowed the consolidation of the new territories under a single royal power,—

VIII. 4—The Seventeen Maxims of Shotoku Taishi
This is the oldest code of politics in Japan

analogous to Clovis' aspiration to dominion over all the Germanic settlements in Western Europe. Socially, they represented the adoption of Confucianism (as Clovis adopted Christianity); indeed many of the passages are recognizable as literal copies from some of the Confucian sages,—as for example, Law IV:[b]

[b] [*Shotoku Taishi's Law IV.*] "The Ministers and functionaries should make decorous behaviour their leading principle, for the

leading principle of the government of the people consists in decorous behaviour. If the superiors do not behave with decorum, the inferiors are disorderly: if inferiors are wanting in proper behaviour, there must necessarily be offences. Therefore it is that when lord and vassal behave with propriety, the distinctions of rank are not confused: when the people behave with propriety, the government of the Commonwealth proceeds of itself."

And the duty of the judge to be impartial is declared in terms which echo down along the ages since Egypt, but are here borrowed from a Chinese sage:[c]

[c] *Law V:* "Deal impartially with the suits which are submitted to you. Of complaints brought by the people there are a thousand in one day. If in one day there are so many, how many will there be in a series of years? If the man who is to decide at law makes gain his ordinary motive, and hears causes with a view to receiving bribes, then will the suits of the rich man be like a stone flung into water, while the plaints of the poor will resemble water cast upon a stone. Under these circumstances the poor man will not know whither to betake himself".

3. During the remainder of this period the three distinctive features are: (1) the establishment of a centralized system of law and justice for the newly conquered domain, on the model of the Chinese philosophy of government; (2) the development of a system of conveyancing for private transactions; and (3) the absorption of the royal power by the civil officers of the court.

(1) The first strictly legal code is a group of short enactments of A. D. 645-6 in the 2d year of the Emperor Kotoku, instituting the Chinese administrative organiza-

tion, fixing the land-titles, and reforming the taxation system. This legislation, known as the Decree of Great Reform (Taikwa), placed for the first time the emperor in a status comparable to William of Normandy after his conquest of England. Among later enactments (for which, in general, Chinese models were used) the most notable was the Code of the Taiho period (A. D. 701), covering the same scope, but much more elaborate than the preceding; some of its provisions on land-tenure were deemed to be still in force a thousand years later.

No original MS. of the Taiho Code now remains; but in A. D. 718 (period Yoro) a revised code was enacted, known as Yoro-ryo, and certain minor regulations for its enforcement, known as the Konin-shiki, were later promulgated in the period Konin (about A. D. 820); of this Konin-shiki a small portion in the original text is still preserved; this is therefore the oldest manuscript of Japanese legal enactments now extant.[5]

Among other features of this legislation is notable the adoption of the old Chinese custom of providing a bell and a box outside the ruler's palace, for suitors seeking justice. The Edict of A. D. 646 says:[6]

[*Taikwa Edict of A. D. 646.*] "This day a bell and a box were provided in the court. The emperor issued an order saying, 'If there be a complaint, ... let the chief or the elder first make inquiry and report to Us. If, however, the chief or the elder

VIII. 5—Konin Code, about A. D. 820

does not come to a clear decision respecting redress, let a document be placed in the box . . . . . The receivers of petitions are commanded to make their report to Us every morning. When We receive this report, We shall draw the attention of the ministers to it, and cause them to consider it, and We trust that this may be done without delay. But if there should be neglect or lack of diligence or bias on the part of the ministers, and thus We should fail to receive the remonstrance, let the complainant strike the bell. This is why the bell and the box are provided.' "

This method of furnishing direct access to the ruler, widely employed in Oriental countries (as noted *ante*, Chap. V, and *post*, Chap. IX), served two purposes. It enabled the common people to seek personal justice from the ruler, by going past the functionaries who surrounded him; and it enabled the ruler himself to keep in direct touch with public opinion, as a guide to legislation and as a check on false advisers at court; the latter being perhaps the more important. In short, as an institution, it was the Oriental counterpart of the much-treasured English right of petition, afterwards rendered obsolete by popular representative government.

(2) The documents of private legal transactions in this period, indicating the development of settled institutions and an incipient system of conveyancing, are copious.[6] They have been well preserved (a remarkable circumstance, for a land of timber buildings, not stone) in the archives of the ancient temple of Shoso-in, at Nara.

VIII. 6—Deed of Sale of Land, A. D. 748
This and the next are among the oldest transactional instruments now extant in Japan

The oldest private instruments in Europe north of Italy, at the monastery of St. Gall in Switzerland, date no further back than the 700's; so that the Japanese records equal them in antiquity.

The following two instruments are among the oldest now extant.[d] The first is a deed of sale of land, dated August, year 28, period Tempyo (A. D. 748):[6]

[*Deed of Land, A. D. 748.*] [Deed reads from U. to M., and is then delivered by the grantee to the temple T., by later memorandum at the top, to transfer title to T.]

"Title-deed of the temple, delivered by the lady Minami to the custodian-priest of the temple [Todaiji]"—

"Respectfully represents the undersigned that he files [in the office of record] the following instrument for the sale of residential land, being one 'tan' in area with two houses, situated at Manda village, Kami county, Uji province. Purchase price ten 'hiki' of raw silk and ten 'tan' of cloth [of quality] payable in taxes. Owner of the land, Uji-no-sukune Okuni, head of household in Kami county. I have duly sold the aforesaid land to the family of the lady Minami Fujiwara, former senior third rank [at court]. I hereby respectfully file the present instrument executed in due form.

"26th day, 8th month, 20th year of Tempyo
Uji-no-sukune Okuni, Seller.

"Approved by the Office of the County:

Uji-no-sukune Kimitari, Head-official, Outer Senior Seventh Rank Lower.

Uji-no-sukune Toye, Second-official, Outer Junior Eighth Rank Lower.

Imaki-no-muraji Yasumari, Fourth-official, No Rank.

"Approved by the Office of the Province:

Wakainukai-no-sukune Azumando, Second-official, Junior Fifth Rank Lower, Twelfth Order of Merit.

Fune-no-muraji Tazukuri, Secretary, Senior Eighth Rank Upper.

Otomo-no-suguri Makimi, Secretary, Junior Eighth Rank Lower.

18th day, 10th month, 20th year of Tempyo."

The other instrument represents a money-loan, dating from April, year 4, period Hoki (A. D. 773):[7]

"[*Mortgage-Loan, A. D. 773.*] Respectfully represents the undersigned that he requests a loan of money at monthly interest. Principal sum, three hundred 'mon', interest, five 'mon' [per month]. One lot of residential land is the security, being one 'tan' [in area] with one shingle-roof house, situated at Yamagimi village, Soyekami province. I promise to repay principal and interest on receipt of my wages. I respectfully file the present instrument executed in due form.

"7th day, 4th month, 4th year of Hoki.

Yamabe-no-chitari.

"Witnesses: Oyake-no-obito Warawako
Hasebe-no-hamatari
Yamabe-no-harima maro
Kon-no-tsukitari

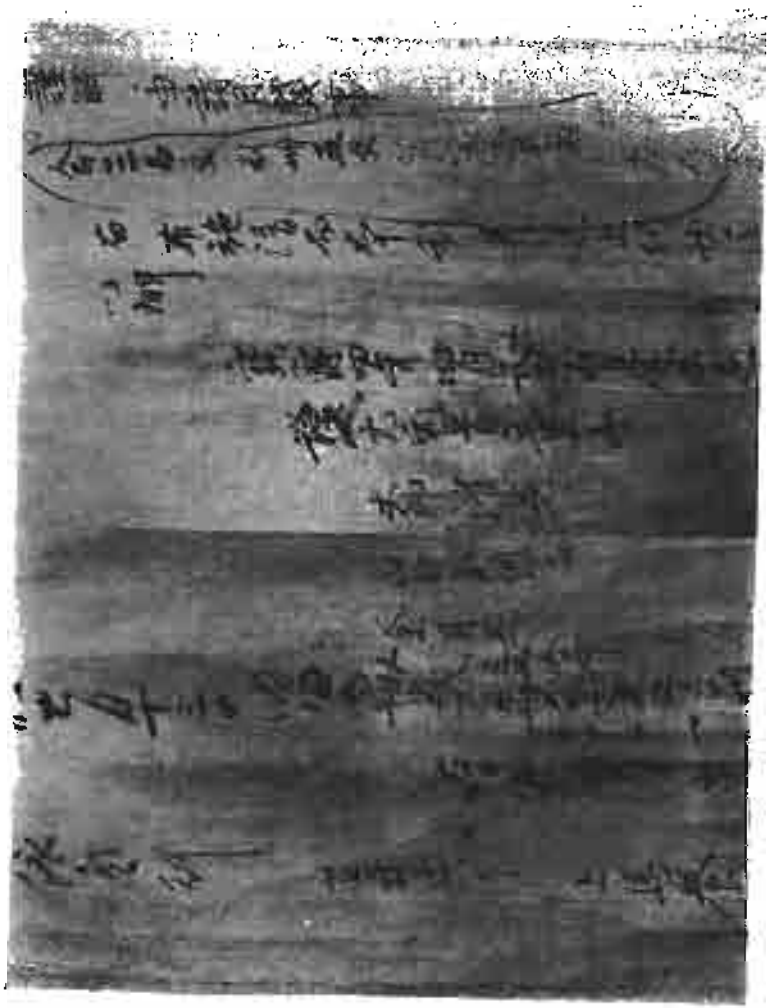
"Joint obligor: Yamabe-no-kimi Iwomaro

[Finger measurement].....[of left index-finger]

Knuckle Joint Joint Tip

"Approval as requested: Katsurai, secretary to Kami-no-Umakai."

[Indorsed later]



VIII. 7—Mortgage-Loan, A. D. 773

3. *Early Government*

"Four hundred and forty 'mon' repaid on 13th day 7th month, being three hundred 'mon' principal, and one hundred and forty 'mon' interest for three months and three days."

(3) The third notable feature of this period was the gradual relegation of the titular ruler (Tenno, or Son of Heaven) to be the symbol of ancestral patriotism and the sovereign in name only, through the absorption of power by the civil ministry of the court, concentrated in the hands of a few families. The dominant Confucian doctrine in China had always idealized government by civilians—intellectuals trained in the art of ruling—as against government by crude military force; and this philosophy naturally bred the growth of a group of court bureaucrats. These "mayors of the palace" now in Japan duplicated the course of history taking place at that very moment in France,—though with a very different outcome. In A. D. 645 one Nakatomi Kamatari became the supreme palace minister; "everything", says the old chronicle, "was done according to his counsel"; and for another three centuries his family (later known as Fujiwara), or its branches, continuously ruled in Japan.[8] The Code of A. D. 646 is attributable to his genius; the Taiho Code of A. D. 701 to his son's; and every subsequent revision for three centuries was presided over by one of his descendants—an extraordinary legislative

VIII. 8—Fujiwara Kamatari
Founder of the great legislative family

record for a single family. The great Kamatari himself had served successively under three emperors, dying in A. D. 669; and his son Fubito was prime minister under five emperors, dying in A. D. 720.

But this rule of the intellectuals at the palace in the capital was finally shattered by the growing power of the rich military barons, who had been invested with large fiefs in the newly settled outlying territories. These barons gradually acquired a semi-independence; and their clan-wars fostered rival ambitions which succeeded in supplanting the palace rule. In the 1100's a radical transformation took place. The palace intellectuals lost their power. The national sovereignty was nominally left in the person of the Emperor at Kyoto, the western capital; but the complete political power was now vested in a Regency, based on military feudal tenure, and located in the East at Kamakura. Thus the second period began.

(II) Second Period

VIII. 9—Yoritomo, The Feudal Organizer

4. The first typical figure of this period is Minamoto Yoritomo,[9] who caused himself to be named Military Regent (Shogun) in A. D. 1192. A great administrator, he consolidated the new centralized feudalism at Kamakura, on the east coast; and as a part of his government he created the Monjusho, or Office of Inquiry and Decision, essentially a court of justice.

He was succeeded, in A. D. 1225, by Hojo Yasutoki, a genuine Edward I, who put the new institution on a firm basis. Yasutoki ordained that the first fifteen days of each month be given up to justice; a bell was hung at the portal of the court (according to the old custom); and when a suitor struck it, his petition was at once attended to; judgments were announced on the 10th, 20th and 30th days of the month. After a few years of experience with the new government, a political code was promul-

gated in A. D. 1232,—the celebrated Jo-Yei Shikimoku, or Ordinance of the period Jo-Yei. These were the first laws promulgated in the Japanese syllabic writing (alongside of the Chinese ideographs).[10]

5. This ordinance, in fifty paragraphs, contained the embryo of a new legal growth. Its main purpose was to regulate the new military-feudal regime; and it contained few rules touching private rights. But for the extensive area of the direct possessions of the new Hojo dynasty it established a judicial organization which was destined to be creative of an indigenous Japanese system. For his Supreme Council, now known as Hyojoshu (a name which afterwards—as with the English Privy Council—received a mainly judiciary meaning), the task was to consolidate his rule over the jealous and powerful barons, to maintain law and order, and to afford to all an example of justice in the Regent's own possessions; for (as in the days of Louis XI) the most powerful barons still in their semi-independent domains possessed "the high, the middle, and the low justice" (*post*, Chap. XV).

In this political task, the most significant paragraph of the Ordinance is the final one, prescribing the oath to be taken by the thirteen members of the Supreme Council, to guide their deliberations in the dispensation of justice; it reveals a shrewd foresight of the difficulties that

VIII. 10—Jo-Yei Code, A. D. 1232

would face the new federated government; and pledges them solemnly, in doing justice, to place dynastic unity before clan separatism:[e]

[*Oath of the Supreme Council.*] "We swear that questions of right or wrong shall be decided at meetings of the Council [in accordance with these institutes].

"Whereas a simple individual is liable to make mistakes through defect of judgment, even when the mind is unbiased; and besides is led, out of prejudice or partiality, whilst intending to do right, to pronounce a wrong judgment; or again, in cases where there is no clue, considers that proof exists; or being cognizant of the facts and unwilling that another's shortcomings should be exposed, refrains from pronouncing a judgment one way or the other; so that intention and fact are in disaccord and catastrophies afterwards ensue:

"Therefore: in general, at meetings of Council, whenever questions of right or wrong are concerned, there shall be no regard for ties of relationship; there shall be no giving-in to likes or dislikes; but in whatever direction reason pushes and as the inmost thought of the mind leads, without regard for companions or fear of powerful Houses, we shall speak out. Matters of adjudication shall be clearly decided, and whilst not conflicting with justice the judgment shall be a statute of the whole Council in session. If a mistake is made in the matter, it shall be the error of the whole Council acting as one. Even when a decision given in a case is perfectly just, it shall be a constitution of the whole Council in session. If a mistake is made and action taken without good grounds, it shall be the error of the whole Council acting as one. Henceforward therefore, as towards litigants and their supporters, we shall never say, 'Although I personally took the right view of the matter, some or such a one amongst my colleagues of the Council dissented and so caused confusion, etc.' Should utterance be given to any such reports, the solidarity of the Council would be gone, and we should incur the

derision of men in after times. Furthermore, again, when suitors having no colour of right on their side fail to obtain a trial of their claim from the Court of the Council and then make an appeal to one of its members, if a writ of endorsement is granted by him it is tantamount to saying that all the rest of the members are wrong. Like as if we were one man shall we maintain judgment.

"Such are the reasons for these articles. If even in a single instance we swerve from them either to bend or to break them, may the gods Bonten, Taishaku, the four great Kings of the Sky, and all the gods great and little, celestial and terrestrial, of the sixty odd provinces of Nippon, and especially the two Gongen of Idzu and Hakone, Mishima, Daimyojin, Hachiman, Daibosatsu and Temman Dai Jizai Tenjin, punish us and all our tribe, connexions and belongings with the punishments of the gods and the punishments of the Buddhas; so may it be!

"Accordingly we swear a solemn oath as above."

This new judiciary institution, with its provincial intermediary judges and intendants, was the model from which all later forms developed. And it gave to the Japanese nation, for nearly a century, the best government it had long known. Law and order reigned; taxes were lightened and impartially assessed; central supervision was diligent; and justice was dispensed promptly and cheaply.

6. But the political equilibrium became again unstable. The Hojo dynasty's court met the same fate as Maximilian's Imperial Chamber in Germany in the 1500's. As time passed, the interned emperors at Kyoto

became restless; powerful barons brewed trouble; rival emperors were set up; weak regents lost their hold; and, after the middle of the 1300's, intermittent civil war once more prevailed—this time for nearly three centuries, ending only with the battle of Sekigahara, in A. D. 1600.

(III) Third Period

7. The first great figure in the third period is that of the victorious Regent, Tokugawa Iyeyasu, in the early 1600's.[11] Under the Tokugawa dynasty of the Regency (A. D. 1603-1868), the nation reached a permanent state of political equilibrium, economic prosperity and social quiet,—comparable to that of France under Louis XIV. Feudal tenures continued, and the military class dominated. But the central federalized government of Tokugawa held unquestioned sway. It now proceeded to close the Japanese islands against all foreign intercourse and the fear of foreign invasion, and provided within its own extensive domains a model of administration for the fiefs of the greater semi-independent barons. The nation henceforth, for nearly three centuries, enjoyed a complete peace, internal and external, unparalleled in any European country.

During that period literature and commerce flourished, and prosperity prevailed. The activities of commerce developed all the expedients and principles of European

VIII. 11—Iyeyasu
The great organizer, who enabled Japanese justice to be developed independently for nearly three centuries

commercial life. Bills of exchange and banks, the clearing house and the produce-exchange, the promissory note and the check, the insurance-policy and the bill of lading, the chain-store and the trade-guild,—all these features of advanced commercial life are seen reflected in the legal records. Even the clearing-house check, and "future" sales on the rice-exchange, are found. How many of the germs of these devices had been originally imported from China, cannot be told. But at any rate the technique of commerce had developed far beyond that of Athens, the most advanced commercial state of ancient times, and at least on a par with that of the then contemporary Europe.

8. Naturally, the native legal talent for law and order now also found its opportunity for development. This took place under the control and guidance of the Regent's Supreme Council. Iyeyasu obliged the great barons to spend a part of each year under his sight in Yedo, his new capital (now Tokyo); and their castle-like mansions and parked estates were a notable feature of that city.[12] And though the great barons, when at home in their own provinces, were allowed to retain local jurisdiction in legal matters (for they had their own courts, like the English courts baron), yet they were virtually under central control. The Tokugawa Supreme Court at Yedo was given a federal original jurisdiction, for suits between

VIII. 12—Feudal Baron's Mansion in Tokyo

parties from different provinces; a certain confirmatory jurisdiction was reserved for death sentences imposed on a vassal in the baron's court for political offences;[11] the barons' judges, on cases within their own provinces, often consulted the Tokugawa Court with a view to uniformity of law; and "in all matters" (says an edict of A. D. 1635) "the example set by the laws of Yedo is to be followed in all the provinces".

Under this regime, a copious stream of legislation and decision, during three centuries of a legal-minded dynasty, now built up the nation's legal system. Three or four outstanding features may be noticed.

9. In general, the laws and decisions were not publicly promulgated; they were circulated in manuscript for the use of officials only. "Not to be seen by any but the officials concerned", is the rubric at the end of the Code of A. D. 1790. This was perhaps on the Confucian principle that the responsibility of doing justice rests on the ruler, not on the people. "The way to govern the country is to secure the proper men; if there be capable men in office, the country is sure to flourish; if there be not capable men in office, it will go to ruin"; such is the literal quotation from Confucius that forms the closing article

VIII. 13—Sentencing a Noble to Suicide

of the feudal Code of A. D. 1615. Another saying of Confucius was often repeated by the Tokugawa rulers: "Let the people abide by the law, but not be instructed in it". The ideal in the framing of a law was to guide the dull magistrate by its provisions, and to permit the wise magistrate to supplement it with his wisdom. And so the written laws were commands addressed to the officials, and not addressed to the people; therefore not needing to be generally circulated.

But the administration of justice was in the hands of a professional class, and to this class the laws were fully made known. There was a large staff of clerks and assistants for the Supreme Court at Yedo, and also for every one of the local magistrates in the counties, who virtually formed a special trained class with permanent tenure and a system of promotions. They were required to be skilled in the keeping of accounts, to have a general knowledge of civil and criminal law, and to be familiar not only with the customs of their own county but with those of adjacent regions. There were numerous books of instruction for these magistrates—some printed, some copied by hand. They went under various names. "Code of Practice" (Koji-sosho-tori-sabaki-sho) is the name borne by a manuscript code dated A. D. 1791—the well-worn 'vade mecum' of some local judge.[14] And there has

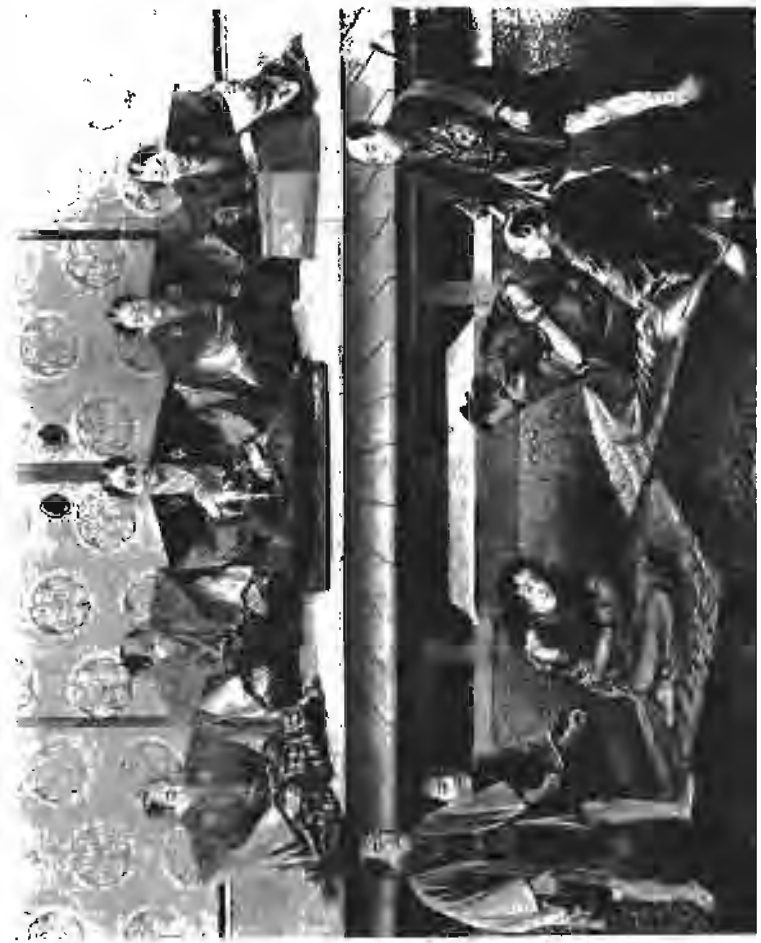
VIII. 14—Manuscript Code of Practice, A. D. 1791

survived doubtless many a "Manual for Trials" (Ko-han-go-tei-sho) in the record-chests of the old county-families.[15]

There were no professional advocates or jurisconsults (as in Greece or among the Mohammedans). Each party was supposed in theory to conduct his own case. To obtain payment of a claim on behalf of another, taking a fee, was unlawful. Nevertheless, many made a practice of thus acting for others, on the pretext of relationship with the party or of his illness and inability to attend; much money was made by such attorneys; but the fee was clandestine.

The trial method was identical with the one already developed in China and in continental Europe,—the inquisitorial method, which gives all responsibility to the trial magistrate. Japan was a country of law and order, for its criminal justice was stern and highly organized.[16] The ideal judge of Oriental romance, endowed with piercing penetration into the hearts of litigants and a sturdy sense of equal justice, was a prominent figure, not only in the government, but also in the popular imagination. Oka Tadasuke, Baron Echizen, in the early 1700's comes down to posterity with a fame like Solomon's; there still circulates among the humbler classes of Tokyo

VIII. 15—Manuscript Manual for Trials (A. D. 1740)



VIII. 16—An Examining Magistrate

a popular book containing the sensational stories of his wonderful insight and shrewd justice.[17] One of the anecdotes handed down about him is almost the exact duplicate of Solomon's judgment between the two women who claimed the same child:[1]

[*A Judgment of Oka Tadasuke.*] "About a century and a half ago, a woman who was acting as a servant in the house of a certain Baron had a little girl born to her. Finding it difficult to attend to the child properly while in service, she put it out to nurse in a neighboring village, and paid a fixed sum per month for its maintenance.

"When the child reached the age of ten, the mother, having finished the term of her service, left the Baron's mansion. Being now her own mistress, and naturally wishing to have the child with her, she informed the woman who had it that she wanted the child. But the woman was reluctant to part with her. The child was very intelligent, and the foster-mother thought that she might get some money by hiring her out. So she refused to give her up to the mother. This of course led to a quarrel. The disputants went to law about it; and the case came up before Oka Tadasuke, then Magistrate of Yedo.

"The woman to whom the child had been intrusted asserted that it was her own offspring, and that the other woman was a pretender. Oka saw that the dispute was a difficult one to decide by ordinary methods. So he commanded the women to place the child between them, one to take hold of its right hand and the other of its left, and each to pull with all her might. 'The one who is victorious,' said the Magistrate, 'shall be declared the true mother.' The real mother did not relish this mode of settling the dispute; and though she did as she was bidden and took hold of the child's hand, she did what she could to prevent the child from

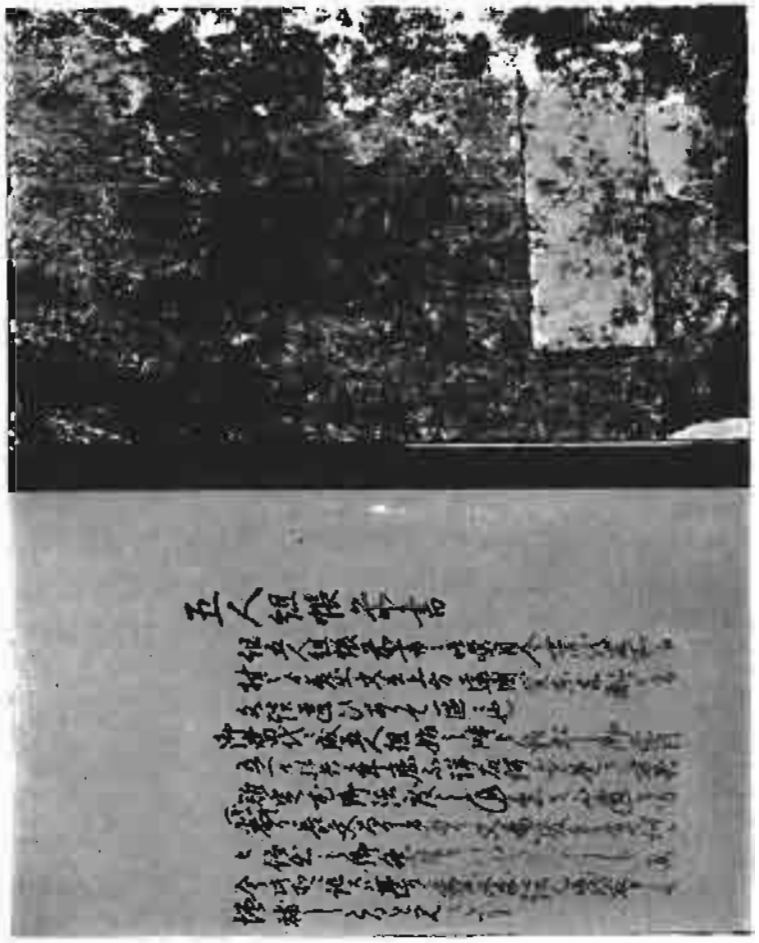
VIII. 17—Oka, Metropolitan Judge of Yedo
Traditions of his judicial wisdom have lingered for three centuries

being hurt, and slackened her hold as soon as the foster-mother began to pull, thus giving her an easy victory. 'There!' said the foster-mother, 'the child, you see, is mine.'

"But Oka interposed: 'You are a deceiver. The real mother, I perceive, is the one who relaxed her grasp on the child, fearing to hurt her. But you thought only of winning in the struggle, and cared nothing for the feelings of the child. You are not the true mother;' and he ordered her to be bound. She immediately confessed her attempt to deceive, and begged for pardon. And the people who looked on said, 'The judgment is indeed founded on a knowledge of human nature.'"

Though the governmental codes were compiled in the form of instructions to officials, it must not be supposed that the laws were secret in any sense. The ordinary trial courts were open to the public. New or standard penal laws were posted on public placards at the cross-roads. The laws of land tenure and family succession were founded on notorious custom. And each village had its own written code of rules for local affairs;[18] this was read aloud by the district magistrate on the first day of each year, and then signed by every householder. It corresponded somewhat to the "keuren" of the Netherlands and the "handfest" and "weistum" of Germany at an earlier period.

10. Another fundamental feature of the system was the principle of conciliation,—the principle so prominent in Chinese justice (*ante*, Chap. IV), and here again (if



VIII. 18—A Village Manuscript Code

not a general Oriental trait) a result of the Confucian philosophy imported a thousand years before.

The principle of conciliation resulted thus: Every town and village was divided into "kumi", or companies of five neighbors, the members of which (somewhat as in the Saxon frankpledge or frithborg), were mutually responsible for each other's conduct. In case of a disagreement between members of a company, the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as at a dinner-party. This, they thought, tended to promote good feeling and to make a settlement easier; for everybody knows, they said, that a friendly spirit is more likely to exist under such circumstances. Even family difficulties were sometimes settled in this way. Thus, if a man abused his wife, she might fly to one of the neighbors for protection, and, when the husband came to demand her, the heads of families in the company would meet and consult over the case. If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters in their own hands and break off intercourse with him, refusing to recognize him

socially; this usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in the larger towns and cities only, where the family unity was somewhat weakened, and not in the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the family or company. A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence. If even the company-chief could not settle the matter, it was laid before the higher village officers, the elder and the headman. In fact, the chief village officers might almost be said to form a board of arbitration for the settlement of disputes; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring headman. If the headman was unable to settle a case, it

was laid before the local magistrate, who, however, almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity.

When a case finally came before the magistrate for decision, it passed from the region of arbitration, and became a law-suit. From the magistrate it might pass to the higher courts at Yedo. But even when the case finally came to the magistrate's court, it was not always treated in the strictly legalistic style familiar to us; the spirit of Japanese justice dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances.

A few selections of actual cases will give a better idea of this conciliatory justice than any number of generalizations. The following documents are from public records, not quite a century old, belonging to a village some eighty miles from Tokyo, lent from the family-chest of an old deputy-magistrate.[8] The first document explains itself:

[*A Concilation Case.*] "Bond offered to Haikichi and Tsubei. My son Sutegoro, on the occasion of a festival at the Zoko temple on the 28th of last month, wounded you and your son Tsubei in a quarrel. We are distressed at hearing that you are to take the matter into court, for my son's punishment would doubtless be severe. We asked Wahei, representative of the farmers of this village, and Tomoyemon, of Hatta village, to mediate and to ask your pardon. We are grateful to you for having extended it, and now promise not to suffer the said son Sutegoro to live in this village hereafter. He has already fled the village, dreading the consequences of his conduct; but if he ever is found again within the village, he shall be treated according to your pleasure: we shall offer no objection to whatever you may do. We offer this document of apology, sealed by the chief of the company and by the mediator.

"Tempo, 11th yr., 8th mo., 3d day [1841].
Farmer Yobei, the parent.
Farmer Sujibei, his relative.
Farmer Isobei, Chief of company.
Wahei, Mediator.
Tomoyemon, Mediator, Chief Farmer."

The next tale is a longer one; for this case went as far as the magistrate:

[*Another Conciliation Case.*] "*Petition* to Shinomoto Hikojiro, Magistrate of Koma County. The undersigned respectfully represents as follows:—

"Uhei, farmer of this village, has laid the following matter before us. A certain Cho, the daughter of Jirozayemon, farmer in Kiwara village, was a farm-servant in the family of Asayemon, a fellow-villager, during the past year. On the 2d of this month this woman Cho, accompanied by her father, by Yazayemon, farmer of that village, and by Tomoyemon, farmer of this village, came to my house, and made the claim that my son Umakichi should marry

her, inasmuch as their previous relations had made it honorable for him to do so. I asked my son if her assertions were true, but he denied it. I told them of my son's denial, and requested these persons to leave the house immediately. But they did not do so; and in my opinion their object was merely to extort money from me by false assertions. On the 4th of this month these persons came again, and threatened me with violence if I did not yield to their demands; but the neighbors intervened, and persuaded them to depart. On the 5th they came again. This time I went with the woman Cho to an inner room, and questioned her sharply, and was convinced that the demand was a trumped-up one. We are watching Cho day and night with four men; for, being a woman, she is more likely to trick us. But all this is very annoying, and I am obliged to beg you to summon these persons and order them to desist. My perturbation of mind incapacitates me from performing my duties as a farmer. I therefore make this respectful request. If you grant it, I shall be forever grateful.

"Tempo, 10th yr., 2d mo. [1840].
Farmer Uhei, Complainant.
Warrantor, Asayemon, Headman of Village.
Countersigned, Ichikawa, Deputy-magistrate of County."

"*Petition for Dismissing a Case.* In the matter of Cho, already reported, we beg to file the following petition for dismissing the case:—

"Cho, daughter of Jirozayemon, farmer of Kiwara village, asserted certain illicit relations with Umakichi, the son of Uhei, in this village; and a demand was made upon Uhei, who reported the matter to your office, and you began to investigate the case. But the affair turns out not to be an important one, and the whole matter has arisen from some foolish statements made by the woman Cho. She has returned to her home, and all the parties are now satisfied with the result. This settlement has been brought about through your influence, and we are very grateful. We beg therefore that you

will shut your eyes to the case, and not give it any further consideration.

"Tempo, 10th yr., 2d mo. [1840].
Ichikawa, Deputy-magistrate.
Farmer Uhei, Complainant.
Headman Asayemon, Warrantor.
Farmer Jirozayemon, Defendant.
Farmer Hichibei, his relative.
Farmer Masabei, his company-chief.
Headman Shirozayemon, Warrantor."

"*Approved:* Shinomoto Hikojiro, Magistrate of Koma County."

When the controversy was pushed beyond the stage of conciliation and reached the Supreme Court at Yedo, still the principle of conciliation left its marks: for the judicial record was usually completed by the filing of an instrument drafted in the name of the parties, reciting the issues, the facts found, and the terms of the decision, and signed by all the parties in token of their assent to the settlement.[19] The following record, marking the last stage of a long-drawn-out litigation over a rural right of easements and profits, illustrates this method:[h]

[*Record of a Case Appealed.*] "*Lawsuit of Kurohira Village, Kai Province, vs. Ontake Village, same province, over Profits à Prendre.* Anyei, 8th year, 10th month, 21st day [1779].

"Yamamura, Baron Shinano [Exchequer Judge], sitting Judge.

"Kurohira Village in Koma County, Kai Province, under the jurisdiction of Local Magistrate Kubo Heizaburo, brought an action before the said magistrate against Ontake Village, same county and

VIII. 19—PARTIES' SETTLEMENT-RECORD, A. D. 1779

The seals at the left show a mode of authenticating similar to the English indenture. The counterparts of the instrument are placed edge to edge, folded, and half the seal-mark remains on each

province and under the same jurisdiction, alleging that Kurohira Village was located at Ontake Mountain, that its inhabitants had since time immemorial been accustomed to make a good subsistence from the woodbote and other profits à prendre on the mountainside; that nevertheless the right of taking wood for buckets and for goldsmith charcoal, included in the aforesaid profits, which Kurohira Village was entitled to take for its own use, was seized by inhabitants of Ontake Village, who prevented passage by the road known as Takashiba Road; and that, since a judgment formerly given on this dispute in the Shotoku period [A. D. 1711-1716] Kurohira Village was greatly suffering for lack of the means of livelihood, and now asked for restoration of its rights under the former custom.

"This suit was disposed of by Heizaburo under the usual procedure and referred by him to the Supreme Court together with the documents and his report. By the Supreme Court a summons was then caused to be served upon both parties and the case was examined anew. It was found difficult to give a correct decision on the matter without a view of the land in question. For this purpose, Nakai Seidayu, another local magistrate, was sent to the said land, and he made an inspection thereof. Upon the report of Nakai Seidayu stating the result of such view and survey, a hearing was again had. Now, by instruction of Baron Matsudaira of Ukio [chief judge] the judgment is given as follows:

"In the judgment given on this dispute in the Shotoku period, it is stated that 'branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom'. But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along that road bearing any profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever. In testimony of obedience to this judgment by both parties, a certificate will be forwarded to this court.

"This judgment will be notified in writing to Ishii Saichiro, clerk of the magistrate Kubo Heizaburo. This case was referred

here by Kubo Heizaburo through the Exchequer Magistrate; there is therefore no declaration on file in this court.

"Attest:

Kamiya Ruhachiro, clerk of the Court".

"Certificate to the Honorable Supreme Court:

"1. Our suit came to this honorable court; but owing to the location of the land in question, it could not, without further inquiry, give a correct decision, and Magistrate Nakai Seidayu was sent to the land, and the land was actually surveyed by him. Upon his return of the results of that survey, a new hearing was had.

"2. Kurohira Village as complainant alleged that since many years ago Kurohira Village had been in possession of the eight sections of land on Ontake Mountain and that certain other hillsides had belonged to it,[20] when they were under the jurisdiction of Matsudaira, Baron Kai; moreover, a hot spring commonly called Tonohira Spring had been in its possession; thus there had been many profits à prendre, such as timber for planks and for charcoal and mushrooms, the use of the hot springs, and the clearing of ground for cultivation. Every year, a quantity of mushrooms and a

VIII. 20—Haruna Mountain and Temple

This is a region similar to the one concerned in the lawsuit,—temple lands in a mountain region

tax amounting to 3 kwam and 500 mon in Yeiraku coinage had been presented and paid in to the then holder of the fief. All the said profits were used to be carried away along the Takashiba Road to Kofu, through the Ontake Temple lane, and sold in the market thereof. In the course of the period Hoyei [A. D. 1704-1710] a dispute took place between Kurohira Village and Ontake Village which was finally adjudged by the honorable Supreme Court, a copy of which was indorsed on the back of the map of the land in question. Later on, in the course of the period Shotoku [A. D. 1711-1716] another suit was brought before the same court with respect to the profits à prendre of the same land, in which judgment was given by the court and again indorsed on the back of a new map of the same land. On that occasion, the map containing the terms of the first judgment given in the period Hoyei, and the old registry of land ownership, was surrendered to the honorable Supreme Court, and the lands of the Ontake Mountain and hot spring above referred to, and other mountain lands individually owned by the farmers, were declared to be temple property. Thus, the old communal rights of Kurohira Village, as well as certain individual titles of its farmers, were lost at one stroke, and the whole community of Kurohira was extremely distressed, so that it was thereafter compelled to seek the profits à prendre of the above description on the land above referred to, for urgent need of want of the means of subsistence, although it did not knowingly act contrary to the judgment given in the period Shotoku. It was truly forced by its extreme necessities to cut down trees, break off branches, and even scrape together leaves, to make the handles of hoes, mallets, etc. All these articles were carried along the Takashiba Road to Kofu, where they were sold to the public. Pursuant to this custom, a group of men of Kurohira Village were passing along the Takashiba Road with the wood for bucket-handles and charcoal, in October, 4th year of Anyei [A. D. 1775] when the watchman of Ontake Village intercepted their passage and seized all their loads, to their great distress. Often before this, the people of Ontake Village had robbed

the men of Kurohira Village of the fruits of their labors; the foregoing was only one instance. Since the judgment in the period Shotoku, Kurohira Village has become gradually poorer and more distressed. On the other hand, the people of Ontake Village continue to open new sections for cultivation on the land in question, and they cut down standing trees at their pleasure.

"The plaintiff village further alleged that it was unaware of any ground for Ontake Village's conduct, which appeared to be inconsistent with the law. The plaintiff was in the habit of presenting mushrooms and paying a tax to the owner of the fief in conformity with former custom. Moreover, it prayed the honorable Supreme Court to recognize its rights in the section bounded by the Iwana river on the South, the Muroka meadow and the peak of Hiraiwa on the North, Ara river on the East, and the two peaks of the Ko mountain and of Hishi mountain on the West. The hot spring would thus, it was believed, fall within its territory. Further, as to the profits à prendre, the plaintiff asserted that it was entitled to carry its loads along the Takashiba Road without any obstruction by the people of Ontake Village.

"3. On the part of the defendant village, it was alleged that the judgment of the period Shotoku expressly forbade the villagers of the plaintiff Kurohira to take the aforesaid profits, or pass along the Takashiba Road therewith or to occupy the said sections, and that, therefore, the defendant village had posted watchmen there to watch for travellers. In October, 4th year of Anyei [1775] some men of Kurohira Village came along the Takashiba Road with loads of wood, and the watchman thereupon seized and took from them the wood, within the limits of their right. Defendant, Ontake Village, possesses a tract of land, granted by the government, yielding 240 bushels of rice; the product of which is allotted to the temple staff for the public expenses of Ontake Village. The section of land between the Main Temple Gate and the Upper Temple is temple-land, by the judgment of the period Shotoku, whose terms are in-

dorsed on the back of the map. Defendant, Ontake Village, has been duly observing the terms of the judgment. Plaintiff, Kurohira Village, owns one piece of farm-land, 26 bushels yield, located within the limits of the Ontake Mountains. But, in strict point of law, it has no title to any of the forest land therein. It did have, by virtue of the former judgment, the right to enter and take the branches and leaves of trees (as materials for hoes and clubs) and ferns and mushrooms, to be found in the forest lands, and it did so take them. Such forest profits are sufficient for its requirements. Nevertheless, it frequently attempted to exceed these rights contrary to the terms of the former judgment, and proceeded also to take articles not expressly permitted by the former judgment to be taken, and passed with them along the Takashiba Road, along which it was unlawful for Kurohira Village to pass. Thus, in spite of its lack of grounds, Kurohira Village unjustly claims that its people are entitled to use that road.

"As to the plaintiff's further charge that Ontake Village has unlawfully and surreptitiously cleared certain land for cultivation and cut down standing trees, the defendant Ontake denies any unlawful conduct on its part. What happened was merely that, at the repair of the temple, some standing trees were cut down, to be used only for that purpose, and after request made to the Temple Commissioner for instructions. In no respect has the defendant acted unlawfully.

"4. The claims of neither party in this suit are fully sustained by the honorable Supreme Court. We have now been given the following judgment: 'In the judgment given on this dispute in the Shotoku period, it is stated that "branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom". But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is

clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along the road bearing profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever.'

"We respectfully acknowledge these honorable orders. In case of our disobedience, we shall be liable to any punishment. In witness of our obedience, we have the honor to file this certificate with the honorable court.

"21st day, 10th month, 8th year of Anyei [1779]

"Plaintiff: Under the jurisdiction of the Local Magistrate Kubo Heizaburo, Kama County, Kai Province;

[Signed] Kurohira Village, by Tozayemon, headman, general representative,

Rihei, company-chief, general representative,

Taroyemon, Agent of the farmers.

Under the jurisdiction of the same office, same county, same province;

"Defendant:

[Signed] Ontake Village

Naito Iki, Chief Elder and Temple Custodian and general representative,

Kubodera Iyo, general representative."

11. The foregoing two features of Japanese justice were attributable to the borrowed Chinese philosophy of

life. But a third feature was indigenous, and has its nearest analogy in English legal history. From the 1600's onward, the highly organized judiciary system began to develop by judicial precedent a body of native law and practice, which can only be compared with the English independent development after the 1400's. It is by reason of this achievement of the Tokugawa dynasty that the Japanese legal system is entitled to be regarded as an independent one. A national law has been developed through precedents by a few other peoples also,—by the Hebrews, the Romans, and the Mohammedans; but in those three systems this was done by unofficial jurists, while in the English and the Japanese systems it was done by the official judges themselves.

For understanding the purport of two or three illustrations, the judiciary organization must be briefly sketched. The Regency domain (i. e. apart from the few large self-governing baronies) was divided into three jurisdictions,—metropolitan, rural, and ecclesiastical. To the Metropolitan Judge were brought all suits in which the plaintiff was a townsman; to the Exchequer Judge all suits in which the plaintiff was a countryman; and to the Temple Judge, all suits by a resident of the ecclesiastical lands. These three judges, sitting in banc, formed the Supreme Court. But the judges were not always the

same persons; because each of these posts was dual, held by two officials, each one of whom in alternate months sat in the Supreme Court (six days in a month.) At other times he officiated in his own jurisdiction. But even here he was more or less an appellate judge, because many or most cases had already been heard by a lower magistrate in each of these jurisdictions; so that there were two possible stages of revision. Original jurisdiction was taken by the Supreme Court in one class of cases only, viz., in suits between parties from different jurisdictions. Otherwise its jurisdiction was appellate only. But an appeal in the strict sense was allowable only on the ground of a denial of justice in the court below—an extreme and rare issue. Instead, however, the revisory function was supplied by frequent voluntary references of cases by the individual member-judges on doubtful points or on subjects calling for a uniform practice.

Such, in rough outline, was the judiciary scheme by which the law was now professionally developed under the Tokugawa dynasty.

The rules of procedure were thoroughly worked out, as befitted an elaborate judiciary system. The following set of rules for the use of maps and plans in land-title disputes will serve to illustrate; it is taken from the Code of A. D. 1742:[1]

[*Rules of Procedure for Using Maps.*] "Upon the adjudication of boundary disputes the plans prepared by the courts of the boundaries of provinces and of counties shall be certified by the seal of the Council of State and those of the three Judges.

"Other plans embodying the judgment of a court shall be endorsed and certified by the joint seals of all three Judges . . . . . .

"In land disputes, the plans of both parties shall be produced; and whether it be the boundaries of a province that are in controversy or merely the boundary of a county, these shall be compared with the government map of the province; and if it be found that in the main there is no discrepancy between them, it shall not be necessary to send a surveyor before delivering judgment. As a rule surveys are not to be too freely ordered, but only in very complicated cases.

"In cases which cannot be decided without the holding of a survey, if the dispute has reference to the boundary of a province or of a county, the government inspectors and the magistrate shall be sent to make the survey. If the dispute relate merely to the boundaries of villages, the magistrate alone is to be sent. And even in disputes as to county boundaries, when the case is free from complications judgment may be given after a survey held by the local magistrate.

"In disputes about rice fields and dry fields and hills and forests and other private rights, when the maps and documents produced by the parties are not sufficiently clear to allow of a decision being given without a rectification of the boundaries, it shall not be necessary to report the case to the Supreme Court for trial, but a subordinate magistrate of the neighborhood is to be sent to carry out a rectification of the boundary."

Formal appeals were comparatively rare. But when the individual member-judge, acting in his own juris-

diction, was in doubt, he prepared a full statement of the case (much after the manner of an equity judge's findings), and submitted it to the Full Chamber for decision. The following commercial case, readily paralleled in our modern civic life, and raising an interesting question of partnership law, shows the technique of this method of decision:

[*Record of a Decision on a Partnership Claim.*]

"An Action by Kinsuke, of Susaki Village, Musashi province, against Toshichi and another, of Ofune-kuramaye ward, Fukagawa District, Yedo, before Baron Sado.
Dated Kokwa, V (Ape), 2, 4 [March 8, 1848].

"1. *Consultation* by Kusumi, Baron Sado, Exchequer Judge.
Kinsuke, dependent in the household of Sobei, elder of Susaki village, Katsushika county, Bushu province, in the magistracy of Saito Kabei . . . . *Plaintiff.*
Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa District, [Yedo] . . . *Defendant.*
Summoned for examination [as witness], Mosuke, renter of the shop of the five-men company, in Shimo ward, Reiganjima, [Yedo].

"The above action was brought before me, a summons issued for the 7th day, and trial had. The plaintiff Kinsuke had formerly lived in Tokoyama-dobo ward, [in Yedo], dealing in sandals. The defendant Toshichi was some years ago in the employment of Heibei, Kinsuke's adoptive father. That Kinsuke had lent certain sums to Toshichi was clear; but the case could not be determined without examining the above Mosuke, renter of the shop of the five-men company, of Shimo ward, Reiganjima, [Yedo], and he was summoned and examined.

"The plaintiff Kinsuke pleaded as follows:—

"The alleged loan to Toshichi was made under the following circumstances. Toshichi, in the last Dragon year [1844] joined in the contract, long held by Mosuke, for the cleaning of the canal passing under Kyo Bridge, and undertook half of the length to be cleaned, agreeing to contribute to the expense, the total amount of which was to be about 3,237 'ryo'. But, his available money not being enough, he informed Kinsuke and requested him to make a loan, showing the indenture executed between himself and Mosuke, and agreeing that payment of principal and interest should be made from the Government-money received from time to time in payment during the progress of the cleaning. The plaintiff then from time to time, beginning with the 12th month of that year, lent various sums to the defendant, sometimes taking an instrument of loan, sometimes getting the defendant's seal in an account-book. But as the undertaking went on, the expense increased beyond the estimates, and the work began to go more slowly; and finally Mosuke, who had other undertakings of the sort on his hand and was pressed for money, proposed to the plaintiff and the defendant to take up jointly with him the cleaning-contract for the above place, just as the work stood. The plaintiff was informed of this proposal by the defendant, and agreed to it, the arrangement being that those sums which had been lent up to that time to the defendant should, with their interest, be left as they were; and any moneys which might be received [from the Government] for the undertaking should be divided among them without caring for settlement of the loan-account. In the 10th month of the next Serpent year [1845] a new indenture to this effect was made out by all parties, and Toshichi and Kinsuke entered upon the work. Kinsuke might have taken an active part with the others in watching the work, employing laborers, paying wages, etc.; but as the business was unfamiliar to him, he left all to the others. The cleaning went on; but after a time some spots were found where the difficulty of the work un-

expectedly increased the expense, so that the original estimate of cost was exceeded; and at last the plaintiff and the defendant were obliged to withdraw from the undertaking, and Mosuke proceeded alone with the remainder and ultimately finished it.

"The total amount of the advances made [by Kinsuke] in this undertaking was 1,920 'ryo' 1 'bu' odd, and of this sum 945 'ryo' had been paid, leaving a balance due of 975 'ryo' odd. Toshichi, indeed, had also made some contributions [to the expenses of the joint undertaking before Kinsuke entered], but these were small. It would be unreasonable, were the plaintiff alone to be the sufferer. Toshichi had invariably evaded with profuse apologies his requests for payment, declaring that he was quite willing to pay, but could not until the accounts had been settled with Mosuke; and yet he continually delayed the settlement of that account. The plaintiff himself had borrowed from different quarters the amounts advanced [to Toshichi], and being without excuse for his own creditors, had been obliged to sell even his house and furniture, and had become a dependent in the household of Sobei, a relative, of Susaki village, Musashi, where he now is. The plaintiff therefore demands a detailed account of the payment of all sums due.

"The defendant Toshichi pleaded as follows:—

"He had formerly been employed by Heibei, the adoptive father of Kinsuke. In the preceding Dog year [1838] he had left this position, and had entered the sandal business for himself, hiring the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa. Meanwhile Mosuke, renter of the shop of the five-men company in Shimo ward, Reiganjima, had taken a contract for the cleaning of the canal flowing under Kyo Bridge; but the area to be cleaned was larger than he was able to undertake alone, and in the last Dragon year [1844] he had asked Toshichi to become his partner and undertake half the length to be cleaned. The cost of the whole undertaking was to be 3,237 'ryo' odd. An indenture was drawn up between them, agreeing that whenever the Government-instalments should

be paid, they should be divided between them. Toshichi thereupon advanced 250 'ryo' odd for the work, and then, not having the money himself, he applied to Kinsuke to furnish further capital. The loans began in the 12th month of the same year, sometimes an instrument of debt being given, sometimes the seal being affixed in an account-book. The agreement was that payment should be made, principal and interest, at each time that a Government-instalment was received. The work of cleaning was begun in the 1st month of the ensuing Serpent year [1845], but it progressed slowly, though several advances of money were made. At this juncture Mosuke, who had taken other contracts of the sort and was pressed for money, proposed that the defendant and Kinsuke should take the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for hire of mud-scows, and take up jointly with him the cleaning-contract for the place already undertaken by Toshichi, just as the work stood. Toshichi informed Kinsuke of the proposal, and, a favorable reply being made, Mosuke gave notice to the authorities and obtained their sanction. The sums already borrowed by Toshichi, with the interest, were to be left as they were, the agreement being that whatever money might be obtained from the undertaking should be divided among the plaintiff, the defendant, and Mosuke. The former having thus become the partners of Mosuke, a new indenture was made out on the 20th of the same month, and the work was entered upon by them.

[Rubric.] "The above instrument was ordered to be produced, and read as follows:

'Indenture.

'Whereas the cleaning of the canal under Kyo Bridge has been undertaken by you, and one of us then agreed to undertake the cleaning of one-half the length, advancing his own share of the expense, and since the work has been begun and during its progress the Government-money has not been sufficient and large amounts of money have been spent; now

therefore it is agreed between all parties that we shall receive the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for the hire of mud-scows, and undertake the cleaning of the portion now remaining, and carry it on until completed and officially inspected; that we shall pay the wages of the bargemen, the expense of official inspectors' sheds and laborers' sheds, fees of superintendents, laborers' wages, etc., and shall make every effort to guard against delay; that we shall have no responsibility in regard to the two special places [left to your charge]; that on request we shall deliver to you your share of any extra payments [of the Government-money] which we may obtain for specially difficult portions; and that you shall leave the pumps, scaffolding, and other apparatus just as they now are, the same to be restored to you on completion of the work. Acting under the agreement thus privately made between us, we shall complete the cleaning not later than the last day of the ensuing 11th month, putting on a sufficient number of men and boats; and if this proves impossible we shall endeavor to cause as little inconvenience as may be. In testimony of this we hereby exchange instruments of the above effect.

'Kokwa, II [Serpent], 10, 20 [Nov. 19, 1845].

Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa.

Kinsuke, land-renter of Jutaro, in Tokoyama-dobo ward. To Mosuke, Esq.'

"The above instrument being drawn up, the plaintiff and the defendant became the partners of Mosuke. But in a short time difficult portions were found in the area to be cleaned, and the cost increased largely, until the amounts paid in by Kinsuke by the 11th month of that year amounted to 1,920 'ryo', 1 'bu'; for the slowness of the work made it difficult to estimate the total cost of any portion

beforehand. Moreover, as the time for completion named in the contract had now expired, the two [Kinsuke and Toshichi] were obliged to give up the undertaking, the remainder of the work being undertaken and ultimately completed by Mosuke. Of the above 1,920 'ryo', 1 'bu', 945 'ryo' in all has since been paid at various times to Kinsuke, and the amount left unpaid is 975 'ryo', 1 'bu'. The above facts are admitted. But [there are reasons why the payment of this remainder should not be enforced]. Now that the plaintiff and defendant, after entering into the above contract and making out a new instrument in which they appeared as partners [of Mosuke] (who appears to have taken advantage of their inexperience in such matters and knowingly included the most difficult places in the portion assigned to them), have given up the undertaking on account of their miscalculation of the expense, it is difficult to see why Kinsuke should make the claim that he does. Of course the defendant occupies the position of a former servant of Kinsuke, and does not wish to appear guilty of a breach of the duty of devotion arising from that relation; but as his account with Mosuke is still unsettled, it is impossible for him yet to settle the claim of the plaintiff.

"Mosuke's statements were as follows: . . . [here his testimony is fully analyzed by the judge.]

"[Findings]: Such were the statements of the parties, [and the court has reached the following conclusions]: It is clear that the plaintiff had lent various sums to Toshichi, taking sometimes an instrument of loan, sometimes the defendant's seal in an account-book. But when the new instrument was drawn up, by which both parties became the partners of Mosuke, and [it was stipulated that] these advances should be left as they were, and that any money which might be received by them from the government for the undertaking should be divided among them on its completion, without caring for any settlement in regard to the above advances, this claim for the advances became merely a partner's contribution sub-

ject to the risk of profit and loss, and was no longer to be regarded as a debt due from one to the other.

"The parties declare that they have no fault to find with the proceedings as related above.

"Trial was held as above related. The parties disagree as to the validity of the claim, but it seems to me that the matter is one of profit and loss, and that the judgment should be that no order of payment should be made. I therefore consult you on the subject.

"Year of the Ape, 2nd month."

"2. *Judgment by the Full Chamber.*

"Kokwa, V (Ape), 2, 4 [March 8, 1848].

Before the Baron Sado, Exchequer Judge.

"An action having been brought by Kinsuke, of Musashi province, Katsushika county, Susaki village, in the district of Magistrate Saito Kabei, for arrears of a money loan of 975 'ryo', 1 'bu' odd, alleged to be due from Toshichi, renter of the shop of Kinjiro, of Fukagawa, Ofune-kuramaye ward, [the defendant was summoned by a 7-day indorsement and trial was had. The judgment is that no further trial shall be had. It is plain that the plaintiff lent the above sum to the defendant, partly on instruments of loan, partly in the shape of book-debts. But when the new instrument was drawn up and the partnership was formed with Mosuke, renter of the five-men-company's shop in Reiganjima, Shimo ward, for the cleaning of the canal, the loan was left as it was, the parties agreeing that whatever moneys might be received for the cleaning upon its completion should be divided among them, and that no further account should be taken of the loan in question, the advances thus becoming a partnership risk of profit and loss. The parties should be directed to hand up an instrument (of submission).

"Note, that as the case was brought up by the Exchequer Judge, there is no complaint on file."

The development of an independent system by case-law is amply revealed in the records of these two hundred and fifty years of Tokugawa precedents. Throughout that period of records, there is found not a single citation of a Chinese or any other foreign law-book, but only of Japanese laws and precedents,—a feature not true of any European people (except the Keltic) since Roman times. The underlying political philosophy was in origin Chinese; but the Tokugawa technique was Japanese. The system was self-developed.

In the following two typical cases, one judge consults another about a pending case; is answered by an opinion citing precedents, drawing a distinction and reserving the distinguished case for future decision; and then, a few months later, the distinguished case comes up on the calendar and the Full Chamber decides it,—all in the best traditional spirit of English case-law[k]. It will be noted that the search for precedents ranged back nearly a century:

[*Supreme Court Opinions on the Survival of a Money-Claim.*]
"Payment by a Debtor who has suffered Local Exile.

"Dated Bunsei, X, 11, 2 and 18 [December 19, 1826, and January 4, 1828].

"1. *Consultation by Sakakibara, Metropolitan Judge of Yedo.*

"Ought not the successor, if any, of a person who has suffered local exile, to undertake the debts of his predecessor, provided no

forfeiture of cultivated and residence land and of other property was made?"

"2. *Answer by Ishikawa, Exchequer Judge.*

"We acknowledge the receipt of your inquiry. We understand you to refer to the case where the defendant suffers local banishment, and we searched for precedents on that point, but found none. We discovered, however, a case where this court was asked, in Gembun, IV, 10 [November, 1739], whether a claim for money lent by one who was afterward sentenced to local exile was subject to extinguishment, in which a negative answer was given, although the contrary rule would apply if a confiscation of patrimony had accompanied the sentence, for this would include the money loan. A sentence of local exile has nothing to do with wife or son, so that the wife or the son may take the cultivated and residence land and other property, or, if there be none, the exile may be given the proceeds of a sale of the property. Now, as even the claim of an exiled creditor is not extinguished, much less should the liability of such a debtor. In the latter case, the name of the debtor's successor, if any, should be substituted by the court in the order for payment; and even if there is no successor, the court should revise the instrument (if confiscation has not occurred), as soon as the debtor has fixed his residence, and deliver it to him, ordering payment without fail. But in Kwansei, VI [1794], the defendant in a suit pending before your predecessor, Ikeda, Baron Chikugo, absconded, and the Full Chamber decided (there being no precedent in which the wife or son had under those circumstances been ordered to be substituted in the order for payment) that in the future in such cases no substitution should be ordered, but the order for payment should be annulled. According to this it would seem proper in the present case to annul the order for payment. Yet if such a rule be established, it would not be just, in our opinion. In ordinary actions on money loans, we have customarily allowed the plaintiff to name the successor as defendant, where [the debtor has died and] a successor is in

existence; and so in case of a pending action, when the absconder's successor is determined, it is but just to have his name substituted, and deliver it to him and order payment.

"If you agree with these views, we trust that you will lay the matter before the Full Chamber, so that our practice for the future may be determined.

"11th month"

"3. *Letter from Ishikawa to Sakakibara.*

Bunsei, XI, 1, 28 [March 13, 1828].

"You consulted us in the 11th month of last year as to the case of a debtor who has suffered local exile. We answered that we hoped to see a rule fixed for the future, not for that case only, but also for that of a debtor absconding pending action brought, and requested you to lay the matter before the Full Chamber, if agreeable. We shall be glad to hear your views on this subject, and beg to ask your advice."

"4. *Answer by Sakakibara.*

Bunsei, XI, 2.

"I consulted you, as you say, in regard to local exiles' debts, and your answer suggested that payment should be ordered, which in fact accorded with my own view, and I made order accordingly. You also noted the case of a debtor absconding pending an action before my predecessor, Ikeda, Lord of Chikugo, in which the Full Chamber decided not to order a substitution of wife or son, which seemed to require me in this case to annul the order of payment; and suggested that such a general rule would be productive of injustice, and that where a successor has been determined, we should order him to pay; and proposed a reference to the Full Chamber. But what I consulted you about was not the case of a debtor absconding pending action brought, but a first-seal case [that is, a case where the defendant is out of the jurisdiction of the Lower Court (in this

case by banishment), and the case must be sent to the Full Chamber for trial]; and we were both agreed, as to this case, that payment should be ordered, and I did so order. So that as to this point no reference to the Chamber seems to be required. As to the other case you spoke of, I am myself not yet decided, and I think it more suitable to consult the Full Chamber when the occasion calls for it."

This particular question, here left undecided, came up a few months thereafter; as the next precedent shows:

[*Supreme Court Opinion on a Successor's Liability.*]

"Dated Bunsei, XI, 4, 2 [May 15, 1828].

"1. *Inquiry by Saga, Baron Bugo, and Ishikawa, Imperial Steward, Exchequer Judges.*

"In cases where the defendant in an action for money lent or unpaid purchase-money has absconded, we have hitherto thought that we should not entertain the complaint, where the creditor sues the successor, because the whereabouts of the debtor may eventually be discovered and he may then be sued. This practice of refusing in such cases originated perhaps in the idea that, even though a so-called successor exists, either there has been no determination that he has in fact become the successor, or else, as sometimes happens, his house is extinct and one of his relatives assumes his estate. Moreover, the disappearance has taken place because of the debtor's adverse circumstances; so it seems doubtful whether a suit against the successor, supposing there were one, would be of any avail. In those cases where a debtor has died [pending suit], and his widow has succeeded him, we have been accustomed to order the suit to be reinstituted against her, describing her in the complaint as 'Haru, widow of Taro,' and alleging that a sum of money lent to the husband in his lifetime is due and unpaid. We have also made some investigations as to proceedings in similar actions against villagers.

In the last year of the Hare [1819], when Ishikawa, Imperial Steward, and Toyama, Palace Warden, were Lawsuit Judges in the Exchequer Department, there were a number of actions on money loans in which the creditor, because the debtor had died or was otherwise unavailable and had left no estate, was suing the surety. It was thought by the court that the clause of the instrument 'If the principal shall be in arrears, etc.,' signified only the case where the principal, in his lifetime, utterly fails to pay the debt; so that where the principal had merely absconded, and no successor exists, the creditor should wait until the whereabouts of the debtor was discovered [and then sue him]; and that therefore suits against the surety should thenceforth be entertained, the principal having absconded, only when the clause read 'If payment by the principal is in any way hindered, payment shall be made by the surety,' and not otherwise, even where the principal had died. The matter was referred to the Full Chamber, and they came to the following conclusion: 'Generally, when a debt is secured by the addition of a surety's name, the purpose of having a surety is that he shall attend to the debt if payment is not made; so that the addition of a surety is to no purpose if the court declines to order payment merely because there is no clause expressing the undertaking of the surety. The obligation of a surety, of course, lasts only during his lifetime [and does not descend to his successor], while that of a principal debtor who dies or absconds survives against his son, grandson, etc., if there be any patrimony inherited. But when a debtor leaves no such successor, the court should order payment by the surety, if, after examining the circumstances under which he became surety, it considers that he ought to be regarded as liable,—and this in spite of the absence of any clause expressly undertaking liability. In answer to the argument that we ought not to hold him liable without such a clause, it may be said that, if we should refuse [creditors would be loath to lend], the money circulation would diminish, and undesirable results would follow. It appears better to order payment by the surety without distinguishing between the clauses "If

VIII. 21—Tombs of the Tokugawa Dynasty at Nikko

the principal shall be in arrears, etc.," and "If the principal's payment is in any way hindered."'

"Such was the decision of the Full Chamber. In the present case, too, we think that it would be unjust if the creditor could not sue the successor, even though the debtor's non-payment is owing merely to his having absconded. However, if on this principle we decided that a relative who assumes charge of the estate and acts on behalf of the debtor in his business or in his cultivation is liable for all the debts of the fugitive as 'undertaker of the estate', then nobody would ever be found to perform such offices, and the result would be many waste estates. In such a case, therefore, the rule should be as hitherto, that the mere undertaker is not to be charged with debts. But henceforth, when a suit is brought by the creditor against the son or other alleged successor to the estate of the fugitive, the plaintiff should consult with the officers of the defendant's village, and obtain from them a certificate of identity of the defendant, bearing the names and seals of the village officers and certifying that the defendant has succeeded to the estate of the fugitive; and if the plaintiff can show such a document, he may go on with his suit.

"We think that the rule should be thus, and [we have the less hesitation in coming to this conclusion because] there can be no objection, since the order of the last year of the Horse [1822] respecting money loans, unpaid purchase-money, etc., on the part of village officers, to forwarding the necessary certificate of identity.

"We therefore make the above proposal. 4th month.

2. *Decision of the Supreme Court Full Chamber.*

"Decided in accordance with the proposal, Bunsei, XI, 4, 2, [May 15, 1828]."

The Tokugawa legal system, thus developed by native genius,[21] might in the local course of events have produced

more distinctive fruits of independence. But at this juncture international history diverted its destiny.

(IV) Fourth Period

12. In 1853 the long international seclusion of Japan was broken. Commodore Perry came with his American fleet, and demanded rights of trading. Other nations followed. In these treaties the Japanese gladly conceded to the foreign nations the power and duty of extra-territoriality, i. e. jurisdiction over the foreign nationals, as the price for refusing general rights of settlement throughout the land. Meanwhile the powerful semi-independent barons seized the opportunity to rebel, denouncing the Regency for its subservience to the foreign nations. By the revolution of 1868, the political sovereignty shifted back, after seven centuries, from the Regency to the Emperor.

Japan now realized that the time had come for it to absorb all the science and arts of the Occident, from which it had been secluding itself. To this task the nation's talent devoted itself for the next thirty years.

This task accomplished, the national pride now became restive under the concession of extra-territoriality. In demonstration of its right to resume complete sovereignty over national justice, the Government undertook to re-

make the form of its law on Occidental models. In 1889 came the written constitution; Count Ito,[22] its inspirer and draftsman, ranks as Japan's greatest statesman of the last generation. The most able younger minds were sent abroad to master the Occidental systems of government and law. During the 1880's and 1890's, in Tokyo, thousands of aspirants in Tokyo schools studied the laws of France, Germany, and Anglo-America,—at first under imported law teachers, afterwards under the returned Japanese jurists bearing Occidental degrees.[23] Meanwhile, five new codes were prepared,—first drafted by jurists imported from France and Germany; then re-cast, in contents better adapted to Japanese institutions, by the new generation of Japanese jurists trained in the Occidental laws. These went into force in the last decade of the century. In the next decade, foreign extra-territoriality was relinquished.

VIII. 22—Count Ito Hirobumi
Framer of the Imperial Constitution of 1889

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HATOYAMA KAZUO
President of the Semmon
Law School

KIKUCHI TAKEO
President of the Law Institute

KANEKO KENTARO
President of the Japan Law School

VIII. 23—MODERN LAW PROFESSORS

VIII. 24—MODERN SUPREME COURT BUILDING

From what has been sketched of the Tokugawa institutions of the third period, it is easy to see that the task, in these new codes, was not to create a legal system, but to revise an existing one. But the officials of the old Regency had politically disappeared; and there existed no body of professional juristic literature available for educating the new generation and for supplying the technical legal phraseology. Moreover, foreign expectations had to be satisfied. Hence, in framing the new codes, resort was had to the compact scientific materials of the Romanesque system from the continent of Europe.

The law was re-stated on the classification of the Romanesque law; the new legal language being constructed from the Chinese etymology; for Chinese literature had been to Japan what Latin had been to Germanic Europe.

The Supreme Court,[24] for example, was now called "Tai-shin-in", Supreme Judicial Office, instead of "Hyo-jo-sho", or Chamber of Decisions; and the Code of Civil Procedure was termed "Minji Soshoho Seikai", instead of "Kori-sosho-tori-sabaki-sho". Criminal trials were conducted in court-rooms furnished on the Occidental model; and the bailiffs and police, though gentry ("samurai") by descent, everyone of them, now wore Occidental uniforms.[25] The external modes of the West have been adapted by the native spirit of Japan to form a new composite whole.

VIII. 25—MODERN CRIMINAL COURT-ROOM

This reorganization of the ancient native institutions to suit the times, welding together

VIII. 26—Fuji Mountain

West and East, signified hardly a new legal system, but the re-making of an old one, by a process with which Northern Europe was already long familiar, when Roman law was welded with Germanic law (*post*, Chap. XV). Japan was the first Oriental country to undertake it voluntarily. But it is this same process that is being repeated, in a later generation, in Siam, in China, in Turkey, in Persia; and in those also it has come as a 'quid pro quo' for the relinquishment of extra-territoriality and as a symbol of external assimilation between Orient and Occident.

To future historians must be left the analysis of the future result. The old Japanese artists, in their masterly woodcuts, were fond of depicting the celebrated mountain Fuji, one of the nation's (and the world's) scenic gems. The art of the modern photographer, too, may present it to us in another guise. The impressions are different. But the mountain is the same.[36]

Sources of Illustrations

1. *Map of Japan.* From the map in *Ernest W. Clement* and *R. Hildreth*, "Japan As it Was and Is", vol. I, p. 272 (Chicago, McClurg, 1906).
2. *Buddhist Temple Tower of Ikegami.* From a photograph by *K. Kimbei*, Yokohama.
3. *Shotoku Taishi.* From a photograph, procured for the author by Professor *Kenzo Takayanagi*, of the Imperial University at Tokyo, of a painting, variously attributed, but dating from about A. D. 720; formerly preserved in the Horiuji Temple, but now in the Imperial Household Collection. The two figures at the side are supposed to be the sons of the Prince.
4. *Seventeen Laws MS.* From a photograph, procured by Professor *Takayanagi*, of a MS. of about A. D. 900, in the Iwasaki Library, Tokyo. An older MS., attributed to the Prince himself, is preserved in the archives at Nara.
5. *Konin Code MS.* From a photograph, procured by Professor *Takayanagi*, of a fragmentary palimpsest MS. (from the original 40 volumes), recently discovered in the archives of Prince Michizane Kujo, on a MS. text of the Engishiki, a code of about A. D. 900.

6, 7. *Deed of Sale and Money-Loan.* From photographs, furnished by Professor *Takayanagi*, of MSS. at the Shoso-in, Nara.

8. *Fujiwara Kamatari.* From the illustration in Captain *F. Brinkley*, "History of the Japanese People," p. 147 (New York, Encyclopedia Britannica Co., 1915).
9. *Yoritomo.* From the illustration in *David Murray*, "The Story of Japan", p. 149 (New York, Putnam, 1894).
10. *Jo-yei Code.* From a photograph, procured by Professor *Takayanagi*, of the woodcut printed edition of A. D. 1529 (Year II of Period Kyoroku), now in the library of Baron Hozumi Shigeto. The first printed edition of A. D. 1524 being no longer extant, this is the oldest printed edition available.
11. *Iyeyasu.* From a woodcut by *Toshikata*, reproduced in an anonymous collection of famous pictures published by Sakujiro Hasegawa (Tokyo, 1892). There is also a good portrait of him, in court dress, in Sir *E. Satow*, ed. of "The Voyage of Captain *John Saris* to Japan in 1613", frontispiece (Hakluyt Society Publ., Series 2, vol. 5), of the painting by Kano Tanyu (1641).
12. *Feudal Baron's Mansion.* From the illustration in *Aimée Humbert*, "Le Japon illustré", vol. I, p. 367 (Paris, Hachette, 1870).

13. *Sentencing a Noble.* From the illustration in *Humbert* (cited *supra*), p. 377.

14, 15. *MS. Books of Practice.* From MSS. in the Elbert H. Gary Law Library of Northwestern University.

16. *An Examining Magistrate.* From the illustration in *J. E. DeBecker*, "Saved by the Judge: a Story of the Ancient Japanese Courts" (Yokohama, Gazette Press, 1906).
17. *Oka, Metropolitan Judge of Yedo.* From the frontispiece in "Oka Meiyo Seidan" (Famous Judgments of Oka; Tokyo, n. d.).
18. *Village Code.* From a MS. in the Elbert H. Gary Library of Law.
19. *Parties' Settlement-Record.* From a MS. in the Elbert H. Gary Library of Law.
20. *Haruna Mountain and Temple.* From a photograph by *K. Kimbei*, Yokohama.
21. *Tombs of the Tokugawa Dynasty at Nikko.* From a photograph by an unidentified person.
22. *Count Ito.* From the illustration in *E. W. Clement*, "Handbook of Modern Japan", p. 138 (Chicago, McClurg, 1908).
23. *Modern Law Professors.* From portraits in *J. H. Wigmore*, "Legal Education in Modern Japan" (cited *infra*), pp. 21, 25, 29, 31.
24. *Modern Supreme Court Building.* From the illustration in *Clement* (cited *supra*), p. 164.
25. *Modern Criminal Court-Room.* From *Shintaro Fujita*, "Tokugawa Bakufu Keiji Zufujo", "Descriptive Pictures of Criminal Punishments under the Tokugawa Regency," a book of illustrations by Japanese artists, No. 58 (Tokyo, N. Kobe, 1892), in the Elbert H. Gary Law Library.
26. *Fuji Mountain.* (a) From a woodcut by *Kwazan*, reproduced in "Shimbi Shoin" (Album of Old Masters, Tokyo, 1924); (b) from a photograph by *K. Kimbei*, Yokohama, 1892.

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i. Rules for Using Maps. From the translation in *J. C. Hall*, "Japanese Feudal Law" (cited *infra*), Part I, pp. 693, 701.

j, k. Partnership Lawsuit and Succession Lawsuit. From the translations in *J. H. Wigmore*, "Materials for the Study, etc." (cited *infra*), Part III, p. 242, No. 60, and p. 32, No. 17.

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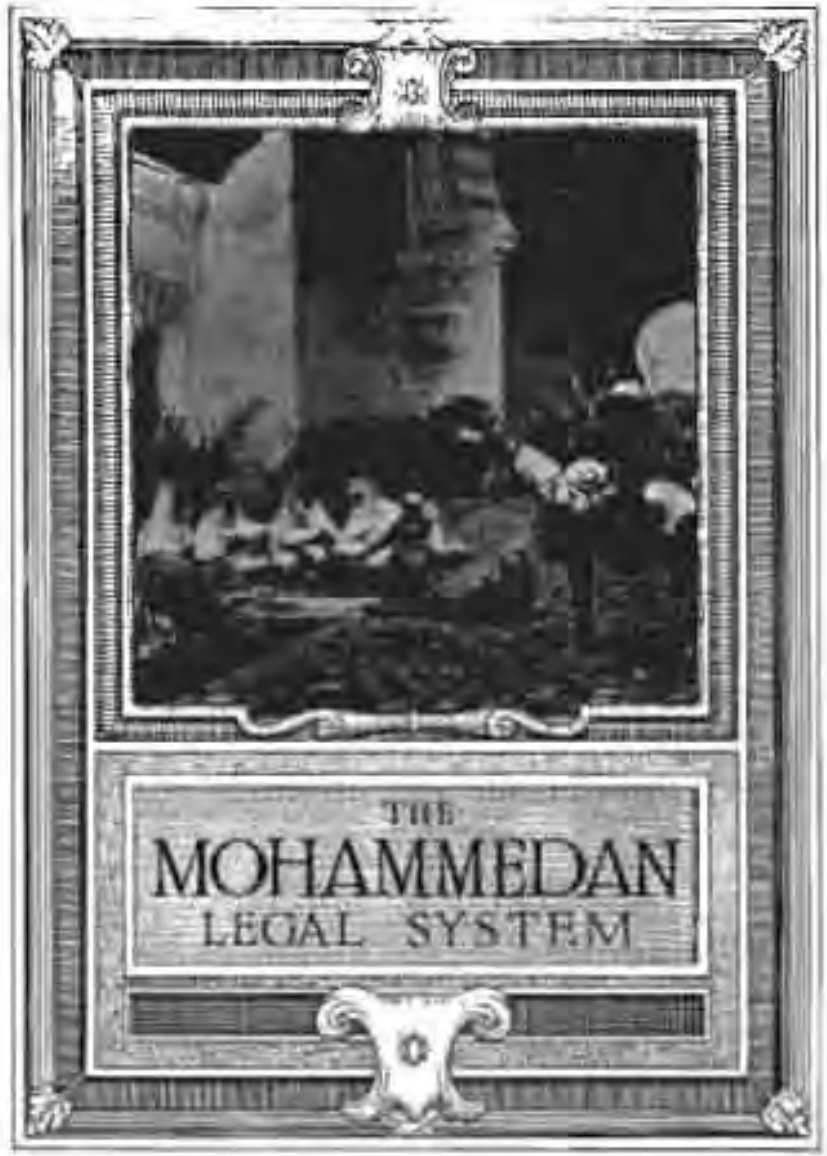
THE
MOHAMMEDAN
LEGAL SYSTEM

IX

The Mohammedan Legal System

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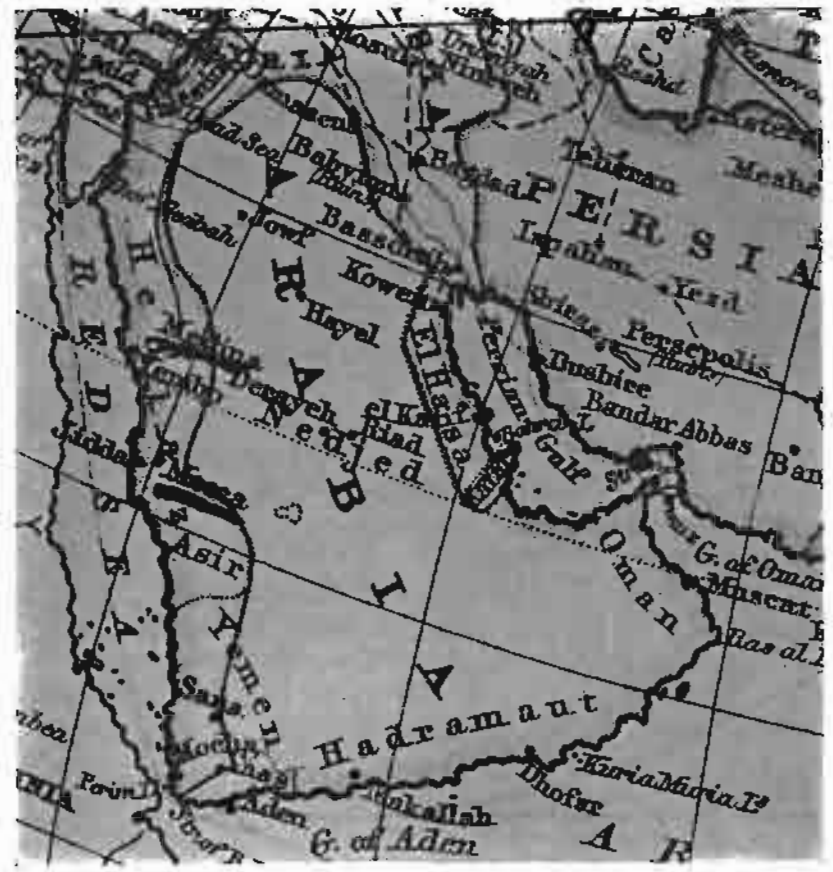


IX. 1—Map of Arabia

IX

The Mohammedan Legal System

(1) Origin and Spread of Islam

THE term "Mohammedanism" is not used by its believers. The correct term for that faith is "Islam", meaning "submission to the one God".

Islam today represents one of the three great world-systems of law. But it began in a backward and unpromising region of the earth,—in Arabia.[1] The northern end of this region had once, long before, been the great commercial crossroads of the ancient world, between Egypt, Assyria, and the Orient. And in Mohammed's day, about A. D. 600, Arabia was again on the main path of commerce, this time by sea, from India. The Arabs were as yet one of the crudest and least developed branches of the Semitic race. They possessed at that time no literature of their own. But with their vigorous propagandism, their fighting talents, and their intellectual receptiveness, they were destined to play a part in history comparable only to the Roman and the Germanic races. Under the new faith, mosques and minarets arose in every region.

Mohammed's creed represented, for the Arabs, the moral and monotheistic reform of an idolatrous people. Spiritually, it did in its day and place very much what

early Christianity and Buddhism had done in their day and place. Its founder touched the heart of the multitude with his creed as only two other characters have done in the world's history.[2] Beginning with a protest against orthodox Arab beliefs, Mohammed was at first persecuted, like the prophets of other new faiths; so he and his followers seceded to Medina, the city thenceforward revered for his memory, where now two hundred thousand pilgrims come annually to renew their devotion. But after the rapid success of the new faith in converting the entire Arab people, its headquarters were transferred to Mecca, the ages-old centre of Arab traditions.

IX. 2—An Arab Leader

In Mecca was located the Kaaba, a square temple said to have been built by Adam and rebuilt by Abraham.[3] One of its sacred stones was brought down from heaven by the angel Gabriel; for the religion of Islam frankly accepted the Hebrew traditions of reverence for Moses and Abraham, as well as the mission

IX. 3—Mecca

of Jesus of Nazareth; and Mohammed claimed no more than to be their successor as a new apostle of the one God.

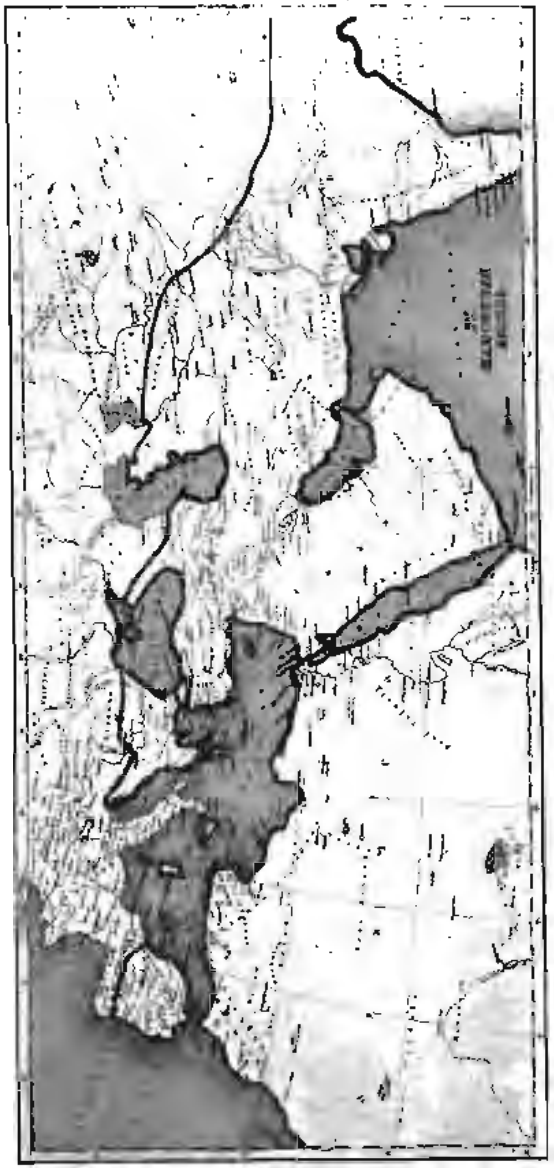
By Mohammed's day, Judaism had long been disintegrated and scattered. The Christian Church also was at its lowest stage; it was hamstrung by the irresistible invasions of the pagan Germanic tribes from the North; it was torn into numberless rival sects by petty doctrinal dissensions; and it was disliked for its rabid persecutions and the scandalous corrupt effeteness of many of its princes and bishops. Islam had the great advantage, over the Christianity of that era, of being a precise, complete, simple, and practicable plan of life. Everything that a Moslem should believe and should do was laid down in the authoritative summaries made, after Mohammed's death, from the book of his sayings and writings. Not only did these didactics cover theology, morals, law, politics, and industry; they were also practicable, making little demand for sacrifice and self-discipline. The Christianity of the New Testament offers a sacrificial ideal that eternally endures in its attraction, despite perpetual failure to live up to it. No society has yet achieved a success in living up to Christianity. But Islam was a success from the start, in scarcely more than a generation.

And so the simple and satisfying creed of Mohammed, carried in holy wars by the zeal and the arms of a young

and freshly inspired people, spread rapidly, eastward and westward. Within little more than a century after Mohammed's death it had reached as far east as India and as far west as Spain.[4] The Arabic language now gradually superseded Greek and Latin, in becoming the vehicle of education and commerce through all the regions west of the Himalayas and along the Mediterranean. The Khalifs were the most potent monarchs of the globe.

The centre of the new empire and religion was at first Damascus in Syria, then Bagdad in Mesopotamia. But later several independent centres developed, in Persia, Egypt, and Spain. At the extreme east in Persia, the throne-rooms and gardens of the Shahs, at Isfahan and at Tehran, still testify to the saying that the march of Islam can always be traced by the Saracen architecture. The climax of its style was first reached in Spain; and at Granada the Alhambra, with its Hall of Justice and its Gate of Justice,[5] has long been renowned for the glorious traditions of Saracen architecture. But Cordoba and Seville, in the palmy days of the 900's, were the centres of western Islamic civilization.

It must be remembered, to appreciate the achievements of the Muslim legal system, that in those four centuries from A. D. 800 to 1200, often called the Dark Ages of Christian Europe, the Arabs or Saracens were



IX. 4—Map of Islamic Regions, A. D. 900

IX. 6—Cordoba; Gate of Pardons

almost the sole vehicle of the world's active intellectual and artistic progress (outside of eastern Asia). Cordoba was the finest capital in Europe; one of the places where justice was done, the so-called Gate of Pardons, may still be seen.[6] At a period when the Germanic tribes still dwelt in rough-hewn wooden hovels thatched and floored with straw, the Saracens of Cordoba and Seville lived in abodes furnished with silken rugs and porcelain vessels, and ornamented with marbles and mosaic; and the city of Cordoba contained nine hundred public baths. At a period when in western Europe scarcely a single layman of any rank could sign his name, and only a few monks or priests could read and write, even the humble working-women of Cordoba made a living by copying manuscripts for the libraries of the rich. In the thirteenth century, in Christian Europe, there was scarcely a prince who had a library, and the largest library then known had only four hundred volumes; while in Cordoba, already in the tenth century, the Khalif's own library had five

IX. 5—Granada: Justice at the Gate

IX. 7—Cordoba: Mosque of Abderrahman

hundred thousand volumes; and there were seventy public libraries besides. In the 900's, the University at Cordoba, attached to the mosque, was then the only one in Europe; it preceded the one at Bologna by three centuries. In this world-famous mosque of Abderrahman,[7] with its dazzling forest of twelve hundred marble columns in endless vistas, the Saracen scholars assembled in quest of learning; and among the thousands of students were found Christians from all parts of Europe. At Granada, the traveler may still see the remnants of another Moorish University, founded in the 1200's. In the sciences and arts, the Saracens were then the preëminent people; in architecture, in mathematics and astronomy, in geography and navigation, in medicine, botany, and pharmacy, they were almost alone. The first European medical school, at Salerno, borrowed almost everything from the Arabs, who had done more for medicine than all the centuries since Galen. Averroes, the Arab philosopher (who was himself a judge), introduced modern rationalism in philosophy; and the complete works of Aristotle, whose philosophy came to dominate in the 1200's, were known to Christian Europe only through Arabic translations from the Greek.

By the 1200's, however, the Renascence in Europe was gaining strength; and Islam was coming to a stand-

still; and about this date begins the third period of Islamic legal history. That history falls into four periods: first, its foundations, in the early A. D. 600's; then its rapid expansion, east and west, to A. D. 1200, and the full development of its legal system; thirdly, from the 1200's, its period of political standstill; and lastly, from the 1500's, the transfer of most of its territories from independent Asiatic or African rulers to European Christian powers:

STAGES OF ISLAMIC HISTORY

PERIOD	EVENTS
A. D. 600	FOUNDING OF RELIGION AND GOVERNMENT
A. D. 630	Mohammed lived A. D. 570-632
A. D. 650	EXPANSION OF RELIGION AND DOMAIN
A. D. 1100	Muslim Law fully developed A. D. 900
A. D. 1200	CLOSE OF POLITICAL EXPANSION
	Moors expelled from Spain
A. D. 1500	Turks checked in Hungary
A. D. 1600	ISLAMIC REGIONS PASS TO CHRISTIAN POWERS
	India, to England. *East Indies*, to Holland
	Algiers, *Morocco* and *Tunis*, to France
	Morocco, to Spain. *Tripoli*, to Italy
	Egypt, to England. *Bokhara*, to Russia
	Balkan States, independent
A. D. 1900	*East and West Africa*, to England, France, Germany, Italy.

Meanwhile, in the second above period, by A. D. 900, the Islamic legal system had been fully developed.

(II) CIVIL JUSTICE OF ISLAM

1. The legal system of Islam, like that of Judaism, is founded on the Word of God, or Koran. The law, or "shariah", is a part of the religion, not a separate thing. To the true Muslim, all other laws are but temporary and human. Islam, originally, for all the kingdoms established by its leaders, was what Greek Catholicism had already become, and what Papal Catholicism five hundred years later aspired to be—a comprehensive system of human life and social order,—religion, morality, politics, and law, all founded on revelation.

That this theory still is a living one can be seen in the epoch-marking Declaration of Independence of Arabia, on June 27, 1916, by which Arabia once more after twenty-six generations became independent. The Turkish Sultan had allied his empire with Germany in the World War; but Hussein, Emir of Mecca, revolting, and proclaiming himself as King of Hejaz, announced this policy:[8] "Arabia's principles are to defend the faith of Islam, to elevate the Muslim people, to found their conduct on the Holy Law, to build up the code of justice on the same foundation in harmony with the principles of religion, and to practice its ceremonies in accordance with modern progress". The author of this proclamation, King Hussein of Hejaz, was a lineal descendant of Mohammed,—the first de-

هذا منشورنا العلم الى كافة اخواننا المسلمين

IX. 8—Declaration of Independence of Arabia, June 27, 1916

IX. 9—King Feisal of Irak

scendant for nearly seven centuries to become Khalif, outside of Persia. He remained for a time the ruler of Mecca, but later abdicated in favor of the Sultan of Nejd. However, hisson, King Feisal of Mesopotamia, or Irak, ruled in Bagdad, the successor of Harun-ar-Rashid; Mosul is in his domain, and he is known as the "oil king of the East". This recurrence of the line of Mohammed's succession in two great Islamic cities after many centuries illustrates the unpredictableness of history.

2. The sources of Islamic law are, therefore, three: first, the Koran, or word of God, as written down by Mohammed; secondly, the sayings and conduct of Mohammed, as preserved in tradition; thirdly, the treatises of jurists, elaborately developing from those fundamentals the legal rules applicable to all the affairs of life.

The Koran was originally written in the square inscriptional style of Arabic letters, known as Kufic;[10] but was later written in the so-called Neskhi script, now the

common modern style. Leather was in Mohammed's time the common material for manuscripts, but sometimes also camel's bones, parchment, and papyrus; after A. D. 900, paper is used exclusively, and papyrus disappears.

About A. D. 650 the Khalif Omar caused a single standard text of the Koran to be prepared, in three originals; all other versions were destroyed; and the text has never since varied in a single word, in any edition.[11] One of these three originals is still preserved under key at

IX. 10—The Koran: Original Kufic Script

IX. 11—The Koran: Arabic and Latin
The Arabic page is the equivalent of the Latin title: "Al-Kran, wahu Shariah al-Islamit Mohammed ibn Abdallah". The word in heavy type, forming the second line from below, is "Mohammed"

Damascus, and is solemnly taken out once a year and exhibited to the elect.

3. But there is little law in the Koran. Hence, the *second* great source of Islamic law is found in the acts and sayings of Mohammed himself. These anecdotes represent Mohammed's philosophy of life and justice. The apostle himself, as leader of his tribe, in his lifetime acted as judge over the disputes of his people. In early Arab life, the mosque was like the Roman forum, the political meeting-place of the tribe; and what is now merely the pulpit of the mosque was once also the judge's seat.

It is certain that Mohammed had a profound instinct for law and order, almost Roman in its spirit. The following instance of his justice illustrates this trait:[a]

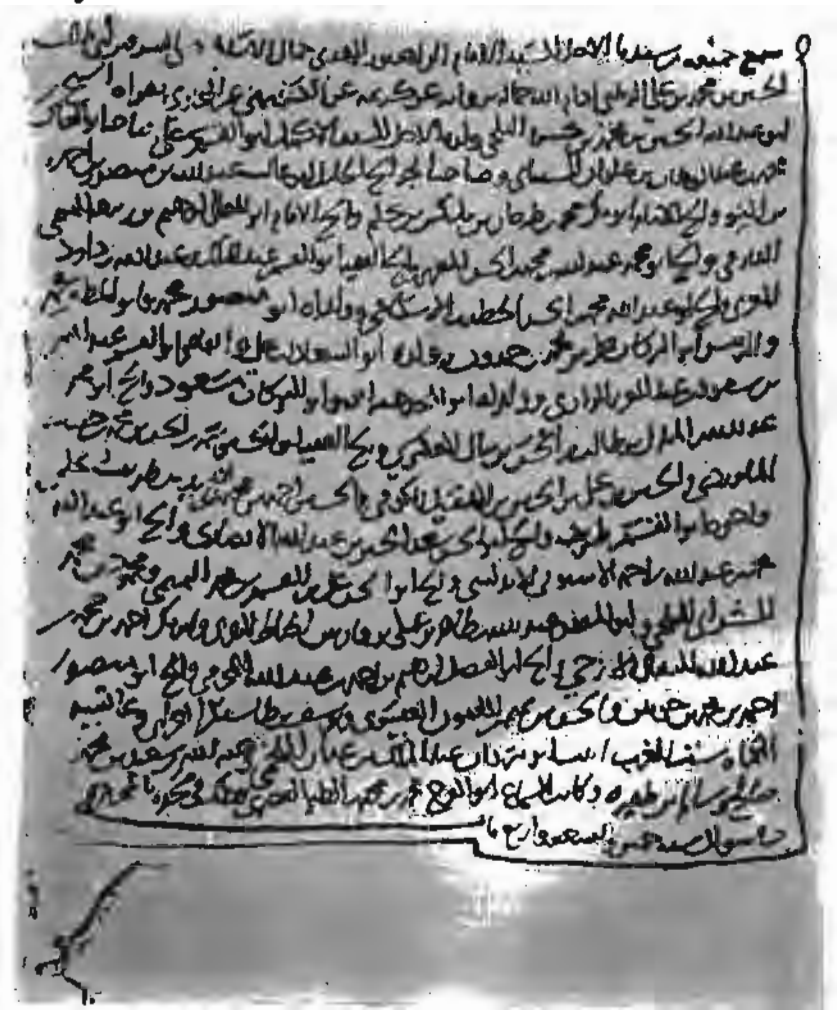
"A woman belonging to the tribe of Makhzum was found guilty of theft; and her relations requested Usama-bin-Zaid, for whom the Prophet had much regard, to intervene and entreat the Prophet to release her. The Prophet said, 'O Usama, do you mean to come to me and intercede against the laws of God?'; then the Prophet convened a meeting, and thus addressed them: 'Nations which have preceded you have been wiped off the face of the earth, for the one reason only, that they imposed punishment upon the poor and relaxed the laws in favor of the rich. I swear by God that if Fatima my daughter were to be found guilty of theft, then I would have her hands cut off'".

One of his recorded sayings was: "One jurist is more powerful against Satan than a thousand unlearned men

with their prayers." Another saying of Mohammed was: "When God wishes to favor one of his creatures, he sets him to learn the law, and word by word makes of him a jurist."

Some six hundred thousand anecdotes had been attributed to Mohammed by tradition; but after careful sifting and verification there remained seven thousand, now accepted as authentic. These are extant in two great collections. The chief one is that of Al Bukhari, who died A. D. 869; his Sahih, or pandects (there is a MS. of A. D. 1102),[12] contain about seven thousand sayings of Mohammed. This book is still in vogue as a source-book, and has been reprinted at Cairo in recent times.

Two or three of these typical anecdotes may serve to illustrate their general style and the manner in which a whole body of principles (here of testamentary law) was gradually built up from them.[b] The following passages deal with the law of succession; and it should be kept in mind, for understanding them, that heirs receive a fixed share, and legatees an amount discretionary with the testator; that (by later interpretation) an heir cannot be a legatee; and that the will, in Mohammedan as in early Germanic law, was used only to give property to others than the legal heirs:



IX. 12—Pandects of Al Bukhari
This is one of the two great collections containing the authenticated sayings of Mohammed

3. *Mohammed's Sayings*

[*The Koran, Sect. IV, Verse 12.*] "God bids that, in distributing an estate, a son receive as much as two daughters; if only daughters remain, and more than two, they receive two thirds of the estate; if only one, the half. Father and mother shall have each one sixth, if there is a child; if none, and parents take, the mother has one third; if brothers survive, the mother takes one sixth; provided that legacies and debts be first paid."

[*Al Bukhari, "Wills", Ch. III, Sect. 2.*] "Sahad tells: I was ill. The Prophet came to visit me. 'O Messenger of God, pray God that I get home before I die.' The Prophet said: 'Mayhap God will cure thee, to be useful among men.' I said: 'I would make a will, and I have only a daughter. I would will away half my estate.' Said the Prophet, 'The half is too much.' 'Then a third?' I asked. 'Yes, a third, but even a third is much'. Since then people have willed away as much as a third; for it is allowed."

[*Al Bukhari, Ch. X.*] "In the passage of Holy Writ 'if one declares a trust or makes a legacy in favor of one's kindred', what is to be understood by 'kindred'? Tsabit, as recorded by Anas, relates that the Prophet said to Abu Talha: 'Make that land an alms for the benefit of the poor among thy kindred'; and Abu Talha did so in favor of Hasan and of Obayi ben Kab. El-Ansari said: 'My father told me that he heard from Tsumama, who heard it from Anas, a saying similar to that of Tsabit; the Prophet said, "Make the alms in favor of the poor of thy family."' "

[*Al Bukhari, Ch. XXII.*] "Ibn Omar relates that Omar, in the lifetime of the Messenger of God, made an alms of one of his properties called Tsamgh, which consisted of a palm-grove. Omar said: 'O Messenger of God, I possess a property which is precious to me, and I would make alms with it.' The Prophet replied: 'Give it in alms, but provide that it shall never be sold nor given away nor divided among heirs, but the fruits of it shall be used.' So Omar made alms with the property, dedicating it to the use of the holy war, the ransom of slaves, and the support of the poor, of guests, of

travelers, and of kindred. It was provided that the trustee might not unlawfully draw therefrom a moderate subsistence either for himself or for a friend, but that he should not enrich himself."

4. Mohammed's example, as a political leader and an administrator of justice, was a compelling inspiration. But there must have been a latent native genius for legalism in the Arab race; for within the next two centuries the judicial and juristic function was fully separated from the executive, as at imperial Rome; a professional body of specialists was developed; and the elaborate system of legal theory was by A. D. 900 well organized by scores of jurists all the way from Samarkand to Cordoba.

And their treatises represent the *third* great source of Islamic law. The earliest legal treatise now textually extant is that of Zaid Ibn Ali; it was composed for the Arabs of the Yemen (southern Arabia), before the great separation into Sunnites and Shiites.[13] Its text dates from about A. D. 760; the chief manuscript from about A. D. 1650; but it was only rediscovered in 1911, in the Ambrosian Library at Milan. It is authenticated (in Arabic fashion) by a chain of certificates, handed down for nearly 1000 years by successive disciples as copyists, verifying the words of the early master.

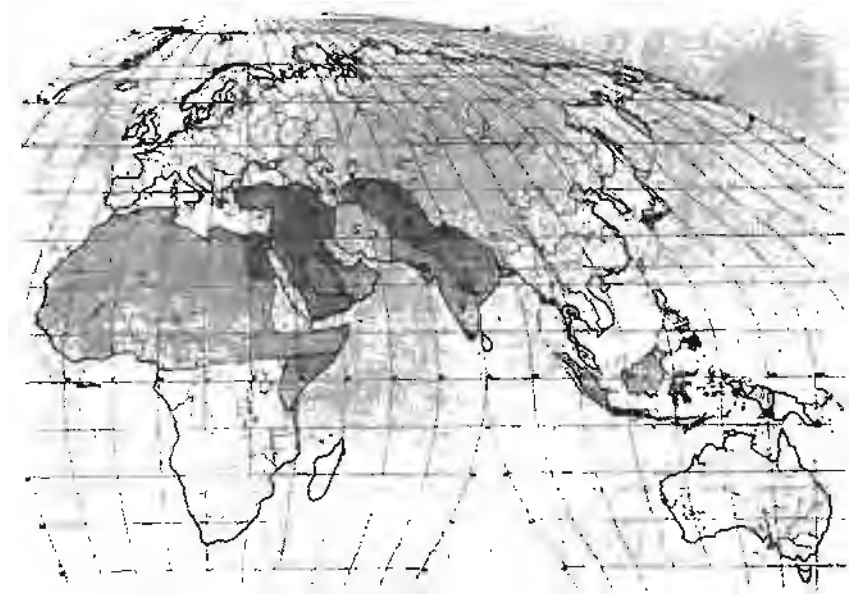
Four or five separate sects (or schools) of law later developed; each of them is founded on the views of some

IX. 13—Treatise of Zaid Ibn Ali, about A. D. 760
The earliest legal treatise on Mohammedan law now extant

famous early jurist,—as if we should have separate schools of legal thought founded on Glanvil, Bracton, Coke, and Bacon. But in the wide area of the Muslim domain, with different races and customs, these sects came finally to represent (in the main) separate regions,—somewhat as Canada, Australia, and the United States now have developed separate brands (so to speak) of Anglican Law.

The principal sects of Islamic law are four. The Shiite is found chiefly in Persia. The Malekite dominates in Mediterranean and middle Africa. The Hanefite prevails in Turkey, Turkestan, Syria, West Arabia, and parts of India. The Shafite obtains in Lower Egypt, South Arabia, Central Asia, and the Dutch East Indies. The last three of these sects are regarded as orthodox, or Sunnites; the first as heterodox. A fifth sect, the Hambalite, has a small following in Central Arabia. Each sect has its own extensive body of legal literature, ranging back through ten centuries.[14]

This vast body of Islamic learning consists (and this is its remarkable feature) entirely of works by jurists, not of government codes and statutes. But it includes, of course, varied styles of exposition,—sometimes a compact codified summary, sometimes a collection of legal opinions, sometimes a philosophical or analytical treatise.



IX. 14—Map of Islamic Law Sects
The colors show the areas in which one or another sect is dominant

(*a*) As an example of the first sort may serve Khalil, the most popular jurist in the North African regions, expounder of the Malekite legal sect. His treatise, called the Mukhtasar, was written about A. D. 1360, and took twenty-five years to compose. Though very concise in statement, almost like a code, it is said to contain about one hundred thousand explicit propositions of law. More than seventy commentaries on it have been written by other authors in the last six centuries.[15]

A few passages will illustrate its peculiar concise style and also the degree of logical and juristic development which had been reached by Islamic law in the 1300's—a period at which English law had not yet developed the conceptions of bankruptcy or partnership.

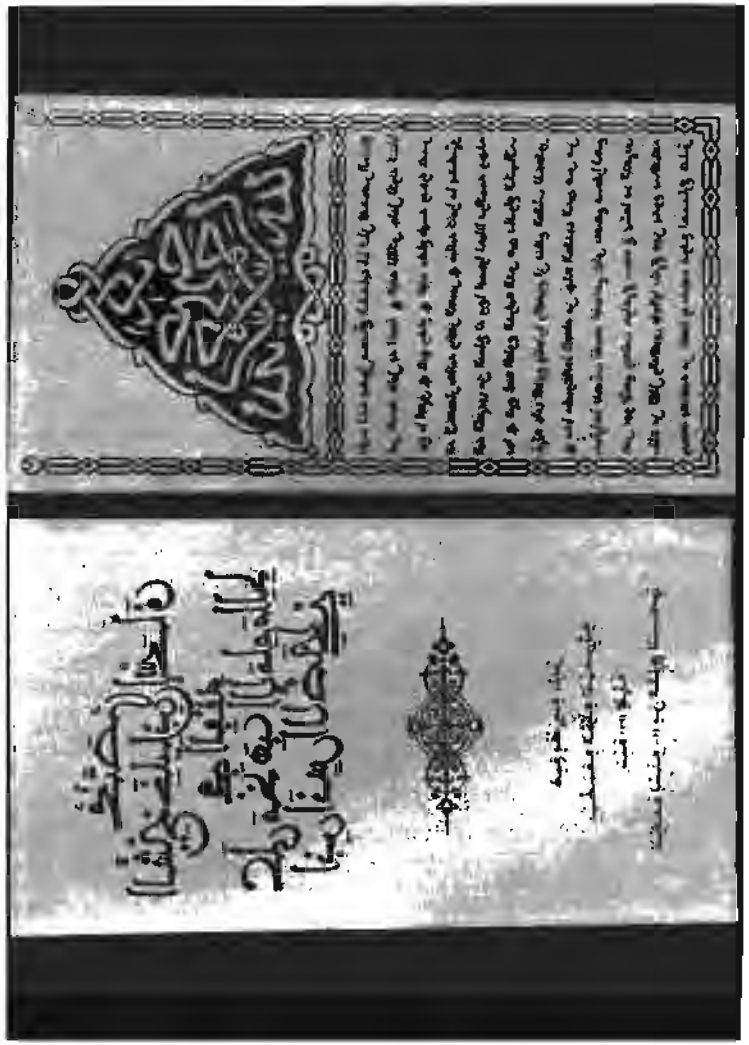
[*Khalil, Tit. I, "Sales", Ch. IV, "Delivery."*][c] "Where a sale is effected by measure, weight, or number, the things sold remain at the vendor's risk until they are measured, weighed, or counted.

"The expenses of delivery are borne by the vendor.

"The thing remains at the vendor's risk so long as it remains in its receptacle, even though the buyer has left the measuring to the vendor.

"The delivery of immovables is effected by the vendor giving up possession; the delivery of movables is effected in accordance with local custom.

"In a perfect sale, the ownership of the thing, and the risks, pass to the buyer, by the mere consent of the parties, except where the vendor withholds the thing on account of non-payment, or where it



IX. 15—The Mukhtasar of Sidi Khalil, ed. 1900
This author is the great authority for the Malekite sect, dominant in African areas

has been seized by judicial decree; in these two cases the vendor's responsibility is on a par with that of a pledgee.

"In case of dispute the payment of the price is primarily incumbent upon the buyer.

"If the object perishes by pure accident whilst still at the vendor's risk, he is relieved from his obligation to deliver it.

"If the vendor has caused the object to disappear or to deteriorate, or if a third person legally claims a share thereof, the buyer is entitled to rescind the sale.

"If the vendor is dispossessed of the greater part of the subject matter constituting the sale, the buyer cannot insist upon the sale of the remainder unless the said subject matter consists of res fungibiles."

[*Khalil, Tit. IV, "Bankruptcy"*.] "[Ibn-'Arfa's definition: Bankruptcy is the judicially decreed forfeiture of a debtor's property in favour of his creditors, which arises owing to his inability to discharge his obligations].

"Every creditor can prevent his debtor, whose debts are greater than his assets, from gratuitously alienating anything; from leaving on a journey, if his debt is to fall due during his absence; from paying another creditor before his debt to the latter has fallen due; from making to certain creditors a general transfer of his property; and, according to Lakhmi and other jurists, from acknowledging debts towards suspected persons.

"The creditor cannot object to the debtor transferring a part of his assets or obtaining securities.

"A debtor shall be adjudged bankrupt in his presence, or even in his absence, unless known to be solvent. The said adjudication shall be effected upon the request of one of the creditors, where default is made in the payment of a debt which has fallen due exceeding the known assets, or where such payment would leave un-

covered debts that have not yet fallen due. Adjudication may be made notwithstanding opposition on the part of the other creditors.

"Adjudication deprives the bankrupt of the right of managing his property; but not from exercising his personal rights, such as repudiating, divorcing, exercising his right of retaliation, manumitting the mother of his child, or giving her her peculium if it be small.

"Adjudication renders the bankrupt's debts demandable even though they have not become due, just in the same way as if he had died; even rent for an unexpired tenancy can be demanded without leaving the bankrupt, who was absent and returns solvent, the possibility of recovering the benefit of his term.

"The bankrupt shall be permitted to designate those chattels which are in his charge by way of deposit, and the depositors shall have to prove the identity of the several chattels.

"After determination of the bankruptcy proceedings, the bankrupt recovers his legal capacity for the time being; but on his acquiring new property it may be seized in favour of his unpaid creditors.

"The debtor may either have voluntarily parted with his assets in favour of his creditors who shall have sold them or divided them up, or he may have been judicially deprived of his assets; in either case, if he contracts new debts, the new creditors shall be placed on a par with old creditors only as regards assets the debtor may have obtained by way of inheritance or as the result of causes pre-existing to his first bankruptcy, as for example a claim for blood-money.

"The bankrupt's chattels shall be sold in his presence under reserve of option to be exercised within three days. Even his books of science and religion and his Friday garments shall be sold if their value is at all considerable.

"A bankrupt cannot be obliged to work or to borrow, to exercise his right of pre-emption or to give up his right to the exercise of

retaliation and accept blood-money (diyah), to deprive his slave under any form of future manumission of his peculium, or to revoke a gift made to his child.

"The sale of animals shall be proceeded with within the shortest delay, and within two months or so immovables shall be sold.

"The proceeds of the sale shall be distributed pro rata among the inscribed creditors, without their having to prove the non-existence of other creditors.

"The claims of a bankrupt's wife with regard to her dower rank with those of the creditors, just as they do in the case of her husband's death; similarly she can claim the expenses she may have incurred for his maintenance, but not for that of his child by her.

"Where heirs to a succession encumbered with debts or known by them to be so, shall have nevertheless paid some of the creditors, these heirs shall conjointly be answerable to any other creditor who subsequently puts in a claim; each heir's liability to be proportional to his share of the succession. The creditor can, for the balance that may still be due, put in a claim against the creditors who have been paid, and obtain a redistribution of the assets.

"The creditors shall for a period varying according to circumstances leave a bankrupt in possession of some food and of sufficient money with which to meet his most urgent needs. They shall allow him and each member of his family one working garment."

[*Khalil, Tit. IX, "Partnership"*.] "A partnership is a contract by which each partner is authorized and is enabled to empower another to administer the common property.

"Partnership can only exist as between persons under no legal disabilities.

"Partnership is made perfect by the mere consent of the parties, given either tacitly in accordance with local custom, or expressly by a stipulation followed by a conformable answer.

by the buyer advancing the funds, he has no lien upon the thing bought with his advance. If, however, a contrary stipulation has been made, he may retain the thing as a pledge."

(*b*) The second style of book, Futawa, or legal opinions on cases presented, is much used by modern kadis (or judges) as a reference book, though it is not studied in the schools. The most famous early collection is the Futawa Alemghiri, a book once in wide vogue in India, composed about 1650, and still in use when the English took over India. Numerous modern collections have appeared, especially in North Africa, down to our own times.

The "futawa", or opinion, emanates from a counsellor, or jurisconsult, whose status in the legal system closely corresponds to that of the private jurisconsult in the classic Roman law and the Romanesque law of the Renascence. This status can be better understood from the brief description of legal education and the judiciary system (*post*, page 574), and from the examples taken from a modern lawsuit (*post*, page 593). The decisions of judges, adopting the principles advanced by a jurist in a "futawa", or opinion, or brief, formed also a source of authority (known as "amal"); and collections of these in print form also a minor source of law in some regions.

(*c*) Of the third style of treatise, the analytic discussion of theory, an illustration may suffice, taken at

random from the Hedaya, by Burhan Adin Ali, written about A. D. 1200, representing the Hanefite sect, dominant in India and Turkey:[1]

[*The Hedaya, Book XV. Of Trusts.*] "A trust, upon becoming valid (that is, absolute, according to the various opinions of our doctors, as here stated,—according to Hanifa, in consequence of the grantor's declaration and the magistrate's subsequent decree, and according to Abu Yusaf, by his simple declaration, and according to Mohammed, by his declaration and delivery to a trustee), it passes out of the possession of the grantor; but yet it does not become the property of any other person; because, if this were the case, it would follow that it is not in a state of detention, but may be sold in the same manner as other property; and also, because if the person or persons to whom it is assigned were to become the proprietor of it, it would follow that it could not afterwards pass out of his possession in consequence of any condition stipulated by the former proprietor,—whereas it is not so, for if a person were to declare a trust of a dwelling-house (for instance) to the poor of a particular tribe, and the poverty of any one of these were afterwards removed, the right in it passes to the others, which it could not do if this person were a proprietor.

"Any undefined part of a thing may be placed in trust. A declaration of trust of an undefined part or portion of anything (such as the half, or the fourth, of a field, house, etc.) is valid, according to Abu Yusaf. Hussein alleges that a trust of this nature is invalid; because as actual possession is held by him to be an essential (by the trustee taking possession of the article appropriated), so, in the same manner, that without which possession cannot take place is also an essential, namely, partition; and this can only be in a thing capable of partition. . . . . The ground upon which the opinion of Abu Yusaf proceeds is, that the partition of an indefinite part of anything is indispensable to the taking possession

of it; but as the taking possession is not (according to him) essential in a case of a trust (whence the means of taking possession is also unessential), it follows that the trust of an indefinite part of anything is held by him to be valid. From this rule, however, he excepts a mosque, or burying-ground, a trust of any undefined portion of which is invalid, although it be of an indivisible nature; because the continuance of a participation in anything is repugnant to its becoming the exclusive right of God; and also, because the present discussion supposes the place in question to be incapable of division, as being narrow and confined, whence it cannot be divided but by an alternate application of it to different purposes, such as its being applied one year to the interment of the dead, and the next year to tillage, or, at one time to prayer, and at another time to the keeping of horses, which would be singularly abominable. It is otherwise with regard to the appropriation of anything else than a mosque or burying-ground; because the appropriation of an undefined portion of any other matter, where it is of an indivisible nature, is decreed to be lawful by all our doctors, as it may be hired (for instance), and the parties may divide the rent.

"If a person declare a trust of land, and it should afterwards appear that an indefinite portion of the land (such as the fourth) was the property of another person, the trust is void with respect to the remainder also, according to Mohammed; because, in this instance, the separation into indefinite divisions is associated with the trust, which is consequently invalid, in the same manner as a gift . . . . . If, however, it should appear that another is entitled to a portion of the land, of a specific and not an undefined nature, in this case the trust is not void with respect to the remainder, because of no indefinite division existing in this instance: and gifts and charitable donations are also subject to the same analogy."

If it is remembered that this style of metaphysical analysis had been developed by a jurist in Turkestan, who

died (A. D. 1213) at a time when the revival of Roman law, three thousand miles away in Italy, was still in its embryo stage, and when Germanic law, after seven hundred years of written growth, had done nothing better than the crude Mirror of Saxony (A. D. 1200, *post*, Chapter XII); one gains a better impression of the extraordinary precocity and originality of the Mohammedan system.

5. Conveyancing of property, in the Islamic system, reached a development well comparable with that of the modern Anglican system,—not only in the standard forms but also in the technical conceptions.

Two examples will suffice:

(1) The "wakuf", or trust, founded on the anecdote of Mohammed last above quoted from Al-Bukhari, and discussed in the passage from the Hedaya, exhibits the remarkable juristic instinct of the Arab thinkers. In the "wakuf" they invented a legal concept which equals if not excels in originality and practical utility the Anglican trust; it combines the ideas of trust, family entail, and charitable foundation. The grantor transfers the bare legal title to God, and appoints an administrator to manage the property for the beneficiary; thus there are four parties to the transaction. This expedient has proved so flexible and so popular that in the Ottoman Empire three-fourths of the city lands were held by this tenure.

Volumes have been written on this institution. The passage above quoted from the Hedaya exhibits some aspects of the logic of the "wakuf". And the following modern judgment interprets a deed employing it to establish an entail;[e] in this opinion (as sometimes in those of our own courts) the plain text of a rule seems to suffer emasculation by interpretation:

"Praise be to God. The late..... ..... having during his lifetime entailed in trust all his real property, both within and without the city, to the benefit of his male children, viz.....and..... ....., to the exclusion of the daughter, as shown in a deed of record in this court dated .....,

"Now appears before this court..... ....., husband of the said daughter, and in her name, by virtue of a power of attorney given by her to him, demands possession of the share of the estate inherited by his principal from her father, if the holy law does not forbid. Such is his claim.

"Her brothers answer that their father has by deed excluded her from the entail, and that she is therefore not entitled to share with them.

"The honorable court, having heard the respective arguments of the parties, and considered the issue fully, holds (may God favor him!) that the entail is valid and that the daughter of the grantor has no right of succession. As a ground for this conclusion, and as settling the doubt in his mind, he cites the following passage from the Jurist Khalil: 'A trust-entail is not good . . . . . if it is made to the benefit of the grantor's sons to the exclusion of

his daughters"; as interpreted by the Jurist Derdir [about A. D. 1780]: 'Such an entail is indeed to be deemed morally censurable; but after the grantor's death his deed cannot legally be deemed void'. Such also was the view of Ibn el Kassim [about A. D. 1720], and it has been followed in practice. The Jurist Abou el Hassen [about A. D. 1300] has clearly shown that the treatise Mudawan [about A. D. 1100] deems a provision of this kind to be only more or less censurable, but not invalid.

"Final judgment rendered this day,....., after due notice and hearing, at a regular session of the court in....."

(2) The other example may be taken from the law of inheritance. For certain reasons, needless here to expound, the refinements of the ordinary Mohammedan inheritance rules are more complex than the Anglican. Keeping in mind the general rule laid down in the Koran (quoted *ante*, page 551) for the relative shares of the several next of kin, we may take an example of the working out of the rules of distribution on these facts: Deceased leaves a wife and, by her, two sons and two daughters; then the wife dies, leaving a mother; then one daughter dies, leaving a husband; and the shares are now to be partitioned:[f]

"Here we have first to consider what would be the portions if the wife and daughter had not died. Remembering that the wife's share is one-eighth, and the children are the father's residuaries, and that a son's share is twice a daughter's, we have:

(1) Wife, 1/8

Residue, 1−1/8=7/8, to be divided in the ratio, 4:2, or 2:1.

Sons, 2/3 of 7/8 = 7/12; each = 7/24

Daughters, 1/3 of 7/8 = 7/24; each = 7/48

(2) Now the wife dies, leaving her mother a sharer, and the four children her residuaries.

Wife's mother, 1/6 of 1/8 = 1/48

Residue, 1 − 1/6 = 5/6, to be divided in the same ratio as the former residue, hence:—

Each son, 1/3 of 5/6 of 1/8 = 5/144

Each daughter, 5/288

Adding these to the original portions, we have:—

Each son, 7/24 + 5/144 = 47/144

Each daughter, 47/288

(3) Lastly, one daughter dies, leaving her husband a sharer, and the two sons (her brothers) and the daughter (her sister) her residuaries.

Husband, 1/2 of 47/288 = 47/576

Residue, 1/2 of 47/288, to be divided in the ratio 4 : 1

Each son, 2/5 of 1/2 of 47/288 = 47/1440

Daughter, 1/5 of 1/2 of 47/288 = 47/2880

Adding these to the portions last found, we have:—

Each son, 47/144 + 47/1440 = 517/1440

Daughter, 47/288 + 47/2880 = 517/2880

Reducing 1/48, 47/576, 517/1440, 517/2880, to the least common denominator, we have in conclusion:

Wife's mother	60/2880
Daughter's husband	235/2880
Each son	1035/2880
Daughter	517/2880."

From these two examples it is easy to conceive that the conveyancing of Islamic law was at least as complex as the Anglican.

Paper was used by the Arabs after A. D. 800, and the pages of a transactional instrument were often pasted together in a continuous roll. And so, not only may the statement of an eminent scholar be credited[8] that some trust-deeds in the Khedivial (now Royal) Library at Cairo are 75 feet long, but in fact a deed has recently there been discovered that is 135 feet long[16]—perhaps the longest deed in the world; it dates from the 1500's, and establishes a trust in favor of the grantor's heirs and freedmen.

The execution and authentication of legal instruments were well provided for. The kadi, or judge, performed the functions relegated to the notary in the Romanesque system, and to the recorder of deeds, in the modern Anglican system. Some modern documents showing the style in Morocco are set forth in the lawsuit described

IX. 16—Mohammedan Trust Deed, 135 Feet Long
Perhaps the longest manuscript deed in the world; now in the Royal Library at Cairo

later (*post*, p. 593). The daily scene before a kadi of Persia in the late 1600s is thus pictured by an eye-witness, an English doctor in the East India Company's service:[h]

[*The Kadi as a Notary.*] "To the cadi's cognizance belongs all manner of contracts, conveyances, and settlements; to which purpose near his door are such as make instruments ready written for sale, in the style of their law, to be presented for the cadi's perusal. Into which inserting the names of John-a-Nokes and John-a-Stiles, Zeid and Ambre, the cadi calls aloud, 'Zeid, where art thou?' who answers 'Here', upon appearance: when the cadi proceeds; 'This house, garden, or land, or anything of that kind, Dost thou sell willingly, and of thy own accord to Ambre?' He affirming, 'Aree, yes.' 'Is the price agreed between you?' 'Yes.' 'Where are your witnesses?' says the cadi; then he replies, 'I have brought them,' who answer for themselves; the cadi asks them, 'Do you know this to belong to Zeid?' Who affirm, it is known to all the town, even to the children. The cadi after these interrogatories, lifts up his voice, and says, 'Does no one forbid this contract?' At which, they jointly cry aloud, 'No one forbids': Whereupon the cadi calls for his seal, which are words engraven on silver; and dipping it in ink, stamps it three or four times in three or four places, especially at the junctures of the indenture, that no room may be left for fraudulent dealing, they not putting their own hands, nor delivering it as their act and deed; but the cadi makes the obligation firm on this wise.

"Usury is forbid by Mohamet, yet no place extorts more for money lent; for ten thomands in a year, shall at a moderate calculation bring them in thirteen every year; . . . . Those who desire to secure their money thoroughly, come to the cadi for a bond, being agreed first on their contract among themselves to pay fifteen, twenty, and sometimes thirty thomands for the use of one hundred for one year. When the money is brought in two bags, with a knife,

IX. 17—Professor and Class, in the Blue Mosque, Cairo
Mohammed said: "Whoever taught me a single word, I was his slave"

book, or mantle, and the owner Zeid cries out before the cadi, sitting on the seat of justice: 'I Zeid do give frankly for the space of one year one hundred thomands; but I sell this book for fifteen, twenty, or thirty thomands to Ambre, and he is content to give it; therefore I desire in the presence of the cadi, that Ambre may be obliged at the year's end to repay me my hundred thomands, according to agreement', and then seizes the fifteen, twenty, or thirty thomands, according to agreement for the book; or if he lets him have the whole hundred, the cadi asks Ambre, 'Art thou content to give this sum?' And he answering, 'Aree, yes', goes on, 'So thou art debtor to Zeid an hundred and fifteen, twenty, or thirty thomands, payable this time twelve months, being fully expired'; to which he replying 'Aree', it is valid in law. In which form of writing such caution is used, that they trust not figures, nor bare words that express the sum entire, and at length, but halve it and part it to prevent equivocation; for example, the sum of an hundred fifteen thomands is the principal, the half whereof is fifty seven and an half; the fifth part is twenty three; deluding hereby the skill of the most subtle sophister, since the subsequents so inexpugnably strengthen the antecedents."

6. We are now prepared to infer that such a legal system could not possibly have been developed or administered without a trained professional class. And what we do find is the most highly organized plan of legal education and judicial training that any of the world's legal systems have ever known. Indeed, it may be affirmed that systematic higher education was the greatest feature in the political and legal success of Islam.[17] Over the gate of the College of Ali is inscribed the saying of Mohammed: "Whoever taught me a single word, I was his slave".

The system of education was this:[i]

SCHEME OF LEGAL TRAINING IN ISLAM (Turkish)

Stage	Name of School	Kind of Degree (analogous)	Qualified as	
			Judge	Counsellor
I	Kharije	A. B.		
II	Dakhil	LL. B.	Inferior Magistrate (*Naib*)	
III	Sahn	LL. M.	Superior Judge (*Kadi*)	
IV	Suleimanye	LL. D. (8 grades)	Provincial Judge (*Devriye*)	*Mufti*
V	(Teaching in above faculties)	LL. D. (4 grades)	Supreme Judge (*Mevleviyet*)	*Mollah*
			Shaikh-ul-Islam	

No one could hold judicial or legislative office until he had received an appropriate higher education in the religious law. Men learned in the law were known as "ulema". There were two classes, judges and jurists (in Arabic, "kadi" and "mufti"); the latter embraced both legislative and private advisory functions, but were not advocates in the narrow sense. There were five principal stages or grades of attainment; and for each grade there

was a degree, or title, with a diploma. After receiving each degree the candidate might go on to a higher institution of study. The first degree (or A. B. as we should say, meaning general higher education) must be obtained by all, but did not alone qualify for any office. The second degree (or LL. B.) qualified to hold the post of Naib, or justice of the peace. The third degree (or LL. M.) qualified to become Kadi, or superior court judge. In the fourth degree (or LL. D.) there were twelve grades; the eighth of these grades qualified to become provincial judge or to become a "mufti" (jurisconsult, jurist), whichever the aspirant might choose; and the twelfth and last grade made of him a "mollah", and qualified him to become a Supreme Court judge or a professor in the highest faculties. All of this education was free; and all of these degree-holders received an official stipend.

The entire body of learned men ("ulema") was grouped under a chief, at Stamboul (Constantinople), the Shaikh-ul-Islam, who was thus the Sultan's supreme adviser in religion and law, and ranked with the Grand Vizier or prime minister. "He is the supreme judge" says an English traveler of the 1600s,[j] "and rectifier of all actions, as well civil as ecclesiastical. The place is given to men profoundly learned in their law and of known integrity. He seldom stirs abroad, and never admits of

impertinent conversation. Grave is his look, grave is his behavior,—highly affecting silence, and most spare of speech. He commonly weareth a vest of green, and the greatest turban of the empire,—I should not speak much out of compass should I say as large as a bushel."[18]

The Shaikh-ul-Islam, with his council, might exercise virtually legislative as well as judicial functions; thus his "futawa", or opinion, had something the status of an imperial rescript in Roman times. This may be illustrated by the celebrated "futawa" authorizing the use of the printing-press, in 1738. Until that time there had been no printing-press in Turkey, and the very proposal spread alarm. So resort was had to the Shaikh-ul-Islam, and his "futawa" read as follows:[k]

"Question: If Zaid, who pretends to have ability in the art of printing, says that he can engrave on molds the figures of letters and words of books edited on language, logic, philosophy, astronomy, and similar secular subjects, and produce copies of such books by pressing the paper on the molds, is the practice of such a process of printing permissible to Zaid by canon law? An opinion is asked on this matter.

"Answer: God knows it best. If a person who has ability in the art of printing engraves the letters and words of a corrected book correctly on a mold and produces many copies without difficulty in a short time by pressing the paper on that mold, the abundance of books might cheapen the price and result in their increased purchase. This being a tremendous benefit, the matter is a highly

IX. 18—The Kadi, with Mufti Attending

laudable one. Permission should be granted to that person, but some learned persons should be appointed to correct the book the figures of which are to be engraved."

Islamic law was thus uniquely organized in its distribution of all the functions of justice between these two separate classes, the judge and the jurisconsult, in one general body.

7. The judge's status has always been especially honored in Islam.[19] Copious biographies, forming a special branch of historical literature, perpetuated the names of judges famous for their wisdom, in a manner paralleled only in the Hebrew and the Anglican systems. Tradition hands down many maxims for the judge's ideals. The Khalif Ali said: "Thy tongue is thy servant —until thou speakest; then thou art its servant. Hence have a care what judgment thou givest." In Khalif Omar's instructions to his first kadi, a thousand years ago, it was said: "If today thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal, and it is better to return to the true than to persist in the false."

As the judge sat in his courtroom (usually in or near a mosque) surrounded by his assessors, readers, clerks, and bailiffs, none could approach or speak to him, even the highest, without permission. This tradition of dignity

IX. 19—A Kadi of Modern Turkey

and respect has continued to the present day. In Morocco, "holding daily sessions (except Fridays and holidays), all the year round without vacations, his courtroom thronged continuously with patient suitors, the kadi sits immobile on his dais, enveloped in his long white robe; his gestures are slow and dignified, full of the unction which befits a sacred office; his words are few, well-chosen, and courteous."[1] Tunis is said by experienced travelers to be the most Oriental of modern Mohammedan cities; and the following vivid pen-picture (in the early 1900's) of a divorce-suit in the kadi's court at Tunis gives us the atmosphere of a Mohammedan lawsuit in that region; the parties here were an Arab husband and his English wife:[m]

[*A Divorce Tribunal in Tunis.*] "All domestic or family affairs come before the cadi, who for the time being represents Mohammed.

"After satisfying the porter at the outer gate that we had no camera about our persons, we experienced no difficulty in gaining admittance to the square court-yard which faces the law-court, and which is exactly similar in the style of its architecture and in character to the colonnaded patio of all Arab houses. The little rooms where the judges administer justice open off this court-yard just as the bedrooms and public rooms opened off the two court-yards in Monsieur Amour's harem.[2][n]

"When we entered there were quite a number of long-bearded, high-stomached, pallid-faced Moors and elderly city-bred Arabs walking majestically about the sunny square, all carrying rolls of parchment in their hands—legal documents, I suppose . . . . . I was suddenly confronted with the most Oriental picture I ever saw;

IX. 20a—Court Ante-Room at Tunis

and there also, in the centre of that green-lined court of the cadi, stood Sylvia Ajeeb . . . . . a slight, grey-clad English figure standing before three large and resplendent judges, who sat humped up on their yellow-slippered feet on broad green upholstered benches, surrounded by orange-yellows and lemon-yellows and grass-greens and almond-leaf greens and salmon-pinks. (This mingling of greens of every shade, from the pale pistachio green to the strong Mohammedan grass-green, and the variety of yellows ranging from orange to pale canary and lemon, is typically Mohammedan.) When my brain had found its focus I saw that Monsieur Ajeeb was standing beside his wife,—a magnificent figure in white cloth, his flowing cloak and clothes richly embroidered and tasselled with silver; and that this scene I had come upon so suddenly signified that Sylvia Ajeeb was standing before the cadi—that she was, in plain English, being divorced.

. . . . . "The court-house was long and narrow and ran broadside with the court-yard.[20b] The walls were hung with grass-green cloth, and green silk covered the benches and luxurious cushions . . . . . The Judges sat cross-legged on high green hassocks underneath highly coloured texts from the Koran; and in all my days I have never seen three graver, wiser, more dignified figures . . . . . The Supreme Cadi (or Sheik-ul-Islam, as he is called) sat on a similar green bench in a little green alcove at the end of the green room. *He* looked even more like a heathen god than the other three, and was still more gorgeously arrayed in salmon-pink and deep orange, and his lofty turban, my guide pointed out, had a vertical division right up the centre; this division of the folds signifies apostolic succession, so to speak. These coiled and towering white turbans give a very majestic and prophetic appearance to

IX. 20b—In Front of the Courtroom at Tunis

grave Eastern faces. Certainly these four wise men of the East looked as though the mantle of the Prophet had fallen upon them.

"Have I in the faintest manner conveyed the picture to you? A vivid green room with nothing in it but the green-cushioned benches and the four stately turbaned figures seated on those benches in grave and awful silence, their orange draperies falling in long lines from their shoulders to the floor, their white-turbaned heads showing clearly against a background of grass-green . . . . . I must own that dainty and beautiful as Sylvia is, she looked totally insignificant beside these Eastern potentates of ecclesiastical justice. The long flowing lines of the Arabs' dress make Western fashions look foolish and hopelessly vulgar.

"With unchanging expressions they went on reading the long legal documents, which were rolled up just as all things that were written used to be rolled up in biblical days. As they turned the roll round and round, the parchment fell over their fine yellow slippers and almost touched the green carpet in front of them.

"Poor little Sylvia, in her French frock and frills, was standing all this time in nervous silence before these sphinx-like representatives of the Prophet . . . . . Monsieur Ajeeb's lawyer, who had apparently handed the judge the written account of the case, was standing close to the bench and occasionally whispered something to him . . . . . But if the cadi before whom she was standing had any thoughts upon the subject he did not show it by the lifting of even an eye-lash. I wondered if he would ever stop reading the document he held in his hand. How anxiously I watched the roll grow thinner and thinner, and the coil on the floor in front of him grow bigger and bigger. Would he never speak!

". . . . . The text of the Koran on the wall opposite caught my eyes, and I kept repeating to myself the last prayer of the Prophet. I wondered if it was that prayer which was written on these green glasses in letters of quicksilver: 'Lord grant me pardon and join me to the companionship of light.' Outside this

silent green tribunal of the cadi I could see the beautiful court-yard filled with vibrating light. The black and white of the arches looked more black and white than ever by their contrast to the vivid colours within; the stucco-work of the colonnade hung like a veil of lace let down from heaven. It was a jewel stolen from the Arabian Nights, a jewel iridescent as an opal which caught its vibrations of colour from the delicate tints of the richly clothed Arabs and Moors who were strolling about, document in hand, awaiting their turn . .

"I was standing just inside the wide open door thinking these thoughts, for you must not imagine that this solemn little court had seats for the curious, as our London law-courts have. No one was admitted into its sacred precincts but the three judges and the Sheik-ul-Islam, who sat apart in this holy of holies, and the four or five people connected with the case.

"At last the judge before whom Madame Ajeeb was standing said something which made Monsieur Ajeeb motion to her to pass along to where the Sheik-ul-Islam was seated. . . . . Not a muscle of his face moved nor a fold of his flowing salmon-tinted robes stirred, and not for one instant did he raise his eyes from the parchment he held in his beautiful hands. The perfect calm of his attitude suggested the repose of a Buddha. You felt instinctively that the judgment of this representative of Mohammed would be a just judgment—the dignity of his features, with their superb expression of indifference, set him far above all briberies or petty partiality. Here was a great man so far removed from the common herd that he must have impressed even the most unimpressionable. Justice seemed to emanate from every fold of his softly falling robe and to lie concealed in each roll of his prophetic turban.

. . . . . "Suddenly he also raised his head from the document he was studying and fixed his far-seeing eyes full on the face of the Englishwoman in front of him. . . . . Still gazing at Sylvia, just as the man of the desert had gazed at her, and as

though he could read on the whiteness of her soul all the thoughts that Allah alone knows, he suddenly asked first Monsieur Ajeeb and then his lawyer a few brief questions. Then twice he addressed Sylvia, prefacing all his questions with the familiar word 'Bismillah!' (In the name of the Lord; this sentence begins every written document and is the opening sentence of every Mohammedan book). . . . . Apparently her answers satisfied the sheik, for he held up his hand as a signal for dismissal; the case was finished. . . . . .I wish I could have understood what the sheik said to Monsieur Ajeeb, for I am sure he gave him a grave admonition. To Sylvia he gave his blessing, for I caught the words 'Selam-a'-Alek!'—'The peace (of Allah) be with thee'."

The "mufti", or counsellor, plays a part closely analogous to that of the jurisconsult in classic Rome and in the Romanesque system of the Renascence,—the role made familiar to us by Portia in Shakespeare's "Merchant of Venice". Though the judge relies upon and adopts one or another of the counsellors' opinions, and though those published opinions (of eminent counsellors) have served as an important source in developing the law, yet the counsellor is sought by the party (rarely by the judge); each party retains and fees a counsellor; and the "futawa", or opinions (if vouchsafed), take the place of the American brief. The opinion is given in writing and presents the arguments in the client's favor. This opinion will be in turn criticized by the opponent's counsellor's opinion. In a case of importance, those briefs and reply-briefs may mount up into dozens.

IX. 21.—A Group of Muslim Jurisconsults

7. *The Counsellors*

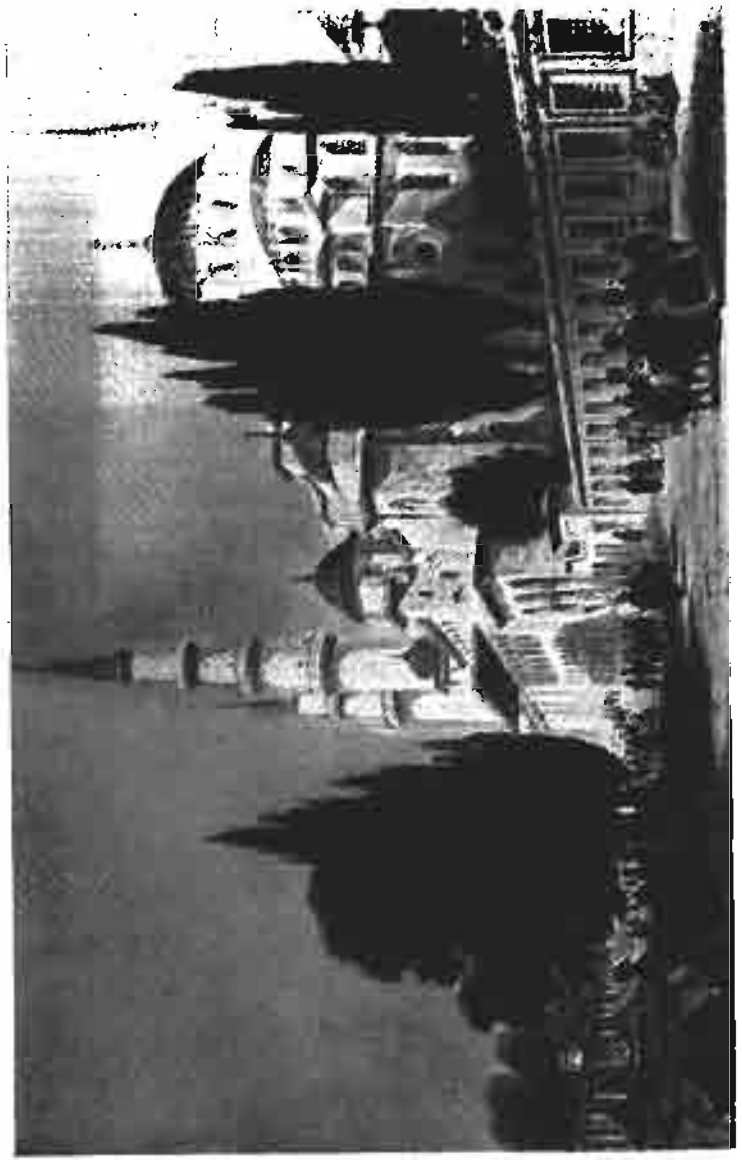
The status of the counsellor is still held in great honor among Islamic peoples;[21] and the following passage of a modern American traveler sketches his impressions of the Street of Aduls, the Inns of Court of Tetuan in Morocco:[22]

"It contained about one hundred cubby-hole offices, open to the street, in which were seated cross-legged the learned men of the law;—all very aged and venerable, with snowy white beard. Clients thronged around one interesting personage, with snow-white head, eyebrows like ermine tufts, gold-rimmed spectacles, and white silk robe. His little office was crammed to overflowing with ponderous manuscripts. Four clients stood waiting patiently, while he perused his commentaries. Finally he attended to the first, a woman. He refused her first retainer; then she offered a larger one. Then he listened, took notes, referred to his books, and told her she had no case. The woman was angry, and demanded the return of the fee. All the passers-by stopped and took part in the argument."

8. The system of legal education and of judiciary organization, just described, dates back, for its beginnings, as early as the second century after Mohammed's death, under Harun-ar-Rashid, the ruler so often mentioned in the Arabian Nights. But it was perfected, for the Ottoman Empire, about A. D. 1500, under Suleiman the Magnificent,—the contemporary of the Emperor Charles V, and of Elizabeth of England. Suleiman was known in the Orient as El Canouni, the Legislator; he has been termed by historians the Justinian of Islam. Advised by the far-seeing Counsellor Abu Suyudi, he presided over

the great task of organizing and adapting Mohammedan law to the needs of the various regions in the new and vast Turkish empire. He was the patron of all the arts, and under him Islamic architecture reached its zenith. He it was who built the Suleimanye Mosque at Stamboul. The Church of Santa Sofia, when Justinian dedicated it A. D. 537, had till then been deemed the greatest work ever completed by architects; Justinian, when he entered it, exclaimed, "Solomon, I have surpassed thee!" But Suleiman said, "I will surpass even the Christian Emperor's work!" The Suleimanye Mosque was his challenge. And the Suleimanye University was his special achievement for the law. By his order, the adjacent court-yards of the mosque became the graduate school for all the other universities.[22] The highest judicial officers in the Ottoman Empire must be graduates of the Suleimanye; and the office of the Shaikh-ul-Islam, the chief of the entire juristic body, was in the northeast corner of this court-yard. It was a brilliant century in Christian Europe; but an Italian traveler of that day at Stamboul is recorded as saying, "One would be very fortunate in Europe if one could appeal from our courts to the Sultan's Supreme Court."

But this system of legal education was not peculiar to Stamboul; it extended to every corner of the Islamic



IX. 22—Suleimanye Mosque and University
Here was held the final course of instruction in Islamic law for the Ottoman Empire

world. Endowed colleges, or "medresseh", had been founded by all the zealous Sultans, Khalifs, or Shahs, in every country. In Persia, for example, at Isfahan, the College of Hussein was one of the finest in Asia. Under the celebrated Sultan Saladin, the chivalrous opponent of the Crusaders in the 1100's, the medresseh, or college, gave rise to a new style of interior architecture, the educational mosque. The central nave was square, and on each of the four sides was a large transept for the professors and their classes,—one transept for each of the four principal sects. There were also a variety of lecture-rooms, libraries, laboratories, between the transepts and the outer walls, and often lodgings for professors and students. In the city of Bokhara, in far Turkestan, one of the world's great religious centres, there are today nearly four hundred mosques, with over one hundred colleges attached,[23] and jurisprudence is the highest stage of their studies. The principal college at Bokhara is that founded by the Khan Abdul Aziz. Each student has a monastic cell to himself; and some students, it is said, have remained there for 30 or 40 years.

But the largest and most famous of these colleges is the one attached to the Mosque El Azhar (which means "the Resplendent") at Cairo. This is the oldest extant university in the world; it was founded A. D. 970, by the

IX. 23—Abdul Aziz College, in Bokhara
There are over one hundred colleges in Bokhara

Khalif El-Mohizz. Its students today number some ten thousand, and there are three hundred professors. It is open to the poorest, without a penny of charge, and without distinction as to caste or race,—a noble example of free education. Even the professors lecture without fees; they eke out a living by private tuition and by copying manuscripts. The students here come from all regions of the faith,—from the African West Coast to the Malay East Indies, each nation having its own portico in the arcade.[14] The most eminent jurists of the Islamic world are found here; and most of the Arabic treatises on law are now printed in Cairo; for Cairo, since some generations past, has become the successor of Damascus, Bagdad, Cordoba, and Stamboul, as the centre of Islam's intellectual activity.

9. In the presence of a system like the Mohammedan, so different in spirit and sources from the other two world-systems, accepted only by Asiatic and African peoples, blossoming precociously a thousand years ago yet surviving actively in today's justice, a lawyer may naturally seek to understand its practical operation more concretely than is to be gleaned from a mere narrative of its sources and organization. Let us, therefore, take a specific example of a modern litigation and peruse the original papers. The following record of a modern law-

IX. 24—El Azhar College, in Cairo
The oldest university in the world. Some ten thousand students attend, taught by three hundred professors

suit (1915-1917) in French Morocco will serve to illustrate some of the foregoing features of the Mohammedan legal system at its best,—the judiciary organization, the careful documentation, the system of proof in judicial proceedings, the part played by the counsellors, the use of authority and precedent in argument and in decisions, and the theoretically religious background of its legal principles.

In this case of *Abd-al-Kader* v. *Mohammed* the plaintiffs, as heirs entitled to share, ask for the partition of an estate which has remained for forty years in the hands of some other heirs; the parties are all descendants of one Bu Salham, deceased, and his name is borne by some of the heirs. The principles of law invoked need not here be explained; except to note that the main controversy, viz., the probative effect of a "lafif", or inquest of neighborhood repute, concerns a mode of proof peculiar now-a-days to Morocco but evolved from an earlier type, and closely analogous to the old French "enquête par turbe", which was once first cousin to the English jury.

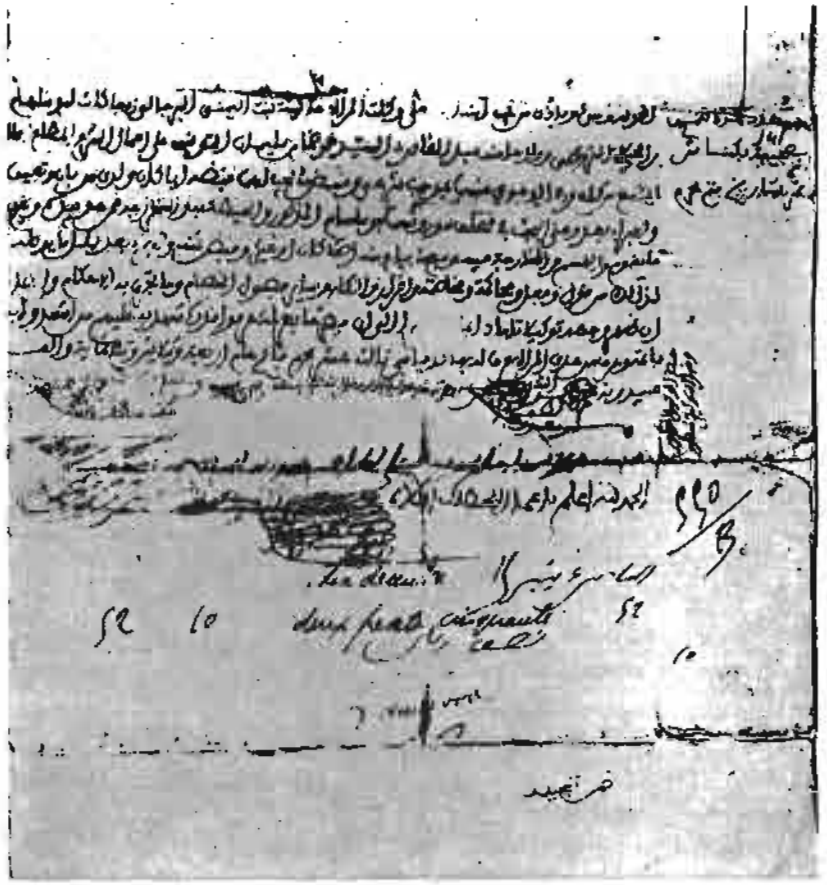
In the record as here translated° are given the complaint (with accessory documents), the answer, the evidence, the arguments, and the judgment; afterwards the appellate opinion on a similar point of law in another case.

The judgment of the trial court (document No. 11) gives a clear summary of the proceedings.

First come the Plaintiffs' Appointment of their Attorney, the Plaintiffs' Statement of Claim, and its service on the defendants:[35]

[1. *Power of Attorney.*] "Power of attorney given to Mohammed ben Ahmad ben Sliman by Aisha bent al-Yamani al-Borjali, wife of Bu Salham ben al-Jilani at-Tazuthi, and their son Abd al-Kader, to enter suit for the estate of the said Bu Salham, to take possession of the said estate, to act in making all proofs, partitions, sales of realty or personalty, to receive payments and give discharges, to file all pleadings, and to make all acknowledgments, refusals, and settlements. A full power, without limit of time, 13th of Moharram, year 1334 [1916]. [Sign-manual of notaries.] [Sign-manual of two judges.]"

[2. *Statement of Claim.*] "Mohammed ben Ahmad ben Sliman, native of Tunis, resident at the town of Sale, acting in the name of Abd al-Kader ben Bu Salham at-Tazuthi, of Sale, and his mother Aisha bent al-Yamani, of the same family, sets forth: That his principals are heirs of al-Yamani, of Bu Salham, and of Rahma, children of Bu Salham at-Tazuthi. The estate of their ancestor consisted of the following: 1 tent and accessories, 40 cattle, 100 sheep, 3 mares, 2 horses, 4 asses, 2 mules, a garden at Ulad Borjal bounded as follows [describing it], a plot of land at the same place known as Hamri, bounded as follows [describing it], and another plot of land at the same place, known as Davdat, bounded as follows [describing it]. The whole estate was taken into possession by Said [another son of the elder] Bu Salham and on Said's decease, by his children, Mohammed, al-Miludi and Mansur. The principals now claim partition of this estate, together with the product and increase of the animals and the fruits of the land since the decease of



IX. 25—Power of Attorney, 1916

the said Bu Salham some 40 years ago. Signed this 6th day of Safar, year 1335 [Dec. 2, 1916]. [Signs-manual of the notaries and the judge.]"

[3. *Service on Defendant.*] "At-Thahar ben al-Akrishi, attorney for the defendant Mohammad ben Said, acknowledges a copy of the statement herewith. Three days given him for filing answer. 9th Safar, year 1335. [Signs-manual of the notaries and the judge.]"

Next comes the Plaintiffs' Preliminary Proof of Heirship, the Defendant's Denial, the Judge's Order to make further Proof, and the Plaintiffs' Further Proof:

[4. *Plaintiffs' Preliminary Proof of Heirship.*] "The witnesses whose names follow attest that they know Bu Salham ben al-Jilani, native of Tazutha, living at Ulad Borjal; that at his death he left as heirs his wife Aisha bent al-Yamani al-Borjali and children by her [1] Abd al-Kader [the plaintiff], [2] al-Yamani, [3] Bu Salham, [4] Rahma, and children by another woman, [5] Mohammad, [6] Said, [7] Allal, and [8] al-Bahlul; that [3] the son Bu Salham died leaving as heirs his mother Aisha above named and the three brothers and sister above-named; that [4] the daughter Rahma died leaving as heirs her mother Aisha and her two brothers above-named; that [2] al-Yamani died leaving as heirs [the plaintiffs] his mother Aisha and his brother Abd al-Kader; that [7] Allal died leaving as heirs his wife Aisha bent Salham at-Tazuthi, a daughter Fatima by another woman, and his brothers Mohammad, Said, and al-Bahlul; that [5] Mohammad died leaving as heirs his two daughters Zahra and Aisha and his two brothers al-Bahlul and Said; that [8] al-Bahlul died leaving as heirs his wife Halima bent al-Hamawi as-Sbihi and his children by her, Bu Salham, Abu-l-Kheir, Mohammad, Gomra, Thamu; that Aisha died leaving as heirs her sister Zahra and her uncle [6] Said; that Said died leaving as heirs his three wives, Um al-Kheir bent Azuz as-Sbihi, Mira bent Said bent Thaleb al Borjali, and Amina bent Bou Azza as-Sahli, also the

children of the first-named wife, viz., two sons [the defendants], Mohammad and al-Miludi, and two daughters Amina and Rahma, also the child Ben-Mansur [a defendant] of his second wife Mira above-named.

"The witnesses affirm that there are no other heirs than those above-named. 30th day of Rabi, year 1334. [Follow the names, in the form given in No. 6 below, of twelve witnesses, the signs-manual of the notaries, and the seals and attestations of two successive judges.]"

[5. *Defendant's Denial*, and *Judge's Order to Make Proof.*] [*a*] "The foregoing statement of claim having been read in the presence of at-Thahar ben Mohammad al-Akrishi, attorney for [the defendant] Mohammad ben Said al-Borjali, the said Mohammad answers by denying. 13th of Safar, year 1335. Copy delivered the same day. [Signs-manual of the notaries, and of the judge and his successor.]"

[*b*] [Copy of the answer in denial of the same statement of claim, made by the same attorney in the name of the defendants al-Miludi and Mansur, 21st Safar, year 1335.] [Copy delivered the same day. Signs-manual of the notaries].

[*c*] "The plaintiffs' attorney Mohammad ben Ahmad ben Sliman having proved the death of [the intestate] Bu Salham al-Tazuthi, and described his estate, is to prove the facts alleged by him in the statement of claim, which are denied by the defendants. 23d Safar, year 1335. [Signs-manual of the notaries, and of the judge and his successor.]"

[6. *Plaintiffs' Further Proof.*] "Praise to God! The witnesses whose names appear below in this document affirm that they knew, well enough to satisfy the law, Bu Salham ben al-Jilani, of Tazutha, residing at Ulad Borjal; that upon his death he left in the hands of his son Said, whom they know as well as they knew the father, the

following: 1 tent and accessories, 40 cattle, 100 sheep, 3 mares, 2 horses, 2 mules, 4 asses, a garden, a plot of land known as Hamri, another plot of land known as Davdat,—the whole located at Ulad Borjal; that on his death the aforesaid Said left the whole in the hands of his two sons Mohammad and al-Miludi, whom the witnesses know as well as is stated above; that they are certain of the above facts, and that this knowledge is based on information acquired by living in the vicinity and acquaintance with the parties. 6th of Rabi, year 1335. [Follow the names and description of twelve witnesses.] Praise to God! The above sworn to before the magistrate [Signs-manual.] Praise to God! The eminent learned and wise doctor of law, whose wisdom is of great esteem, Ali at-Tagrawi, whom may God (whose name be revered!) render worthy of respect for his obedience, now sitting as judge at Sale (and may God keep him and his jurisdiction!) attests the genuineness of this instrument and records it to give effect in law, doing this by authority of his office, and may his generosity and prosperity endure without end. 9th of Rabi, year 1335. [Signs-manual of the two notaries.]"

[*Confirmation of the Foregoing.*] "Praise to God! By order of the learned jurist and eminent doctor Abu-l-Hasan (whom may God render worthy of respect for his obedience!), judge at Sale (whom may God preserve, as well as his jurisdiction!), the witnesses in the annexed document have been questioned as to the testimony purporting to have been given by them, so as to learn how they came to testify and on what knowledge their testimony was based. Each one, questioned by himself, answered, sentence by sentence, as recorded herewith, without addition or diminution. Questions and answers approved, correctly transcribed, authenticated, and filed. 8th of Rabi, year 1335. [Signs-manual of notaries and judge.]"

Next come the Judge's Order Assigning Time for Reply, and the Defendant's Bond to release the interim Attachment:

[7. *Judge's Order Assigning Time for Reply.*] "The attorney Mohammad ben Ahmad ben Sliman has produced a document tending to prove the facts alleged in the statement of claim. The judge has notified the [defendant's] attorney at-Thahar al-Akrishi, with copy of the document, of his opportunity to rebut. The said attorney has given bond to execute any judgment that may be rendered. The judge assigns to the defendant's attorney at-Thahar al-Akrishi one month to answer the said proof. 28th of Rabi, year 1335. [Names of the two notaries. Sign-manual of the judge Ali at-Tagrawi.] Copy delivered 29th Rabi, 1335."

[8. *Bond to Release Attachment.*] "Praise to God! The honorable merchant Thaleb al-Haj Mohammad al-Basha, of Rabat, acknowledges that he is surety to the attorney Mohammad ben Ahmad ben Sliman for all liability that may be adjudged against the defendant Mohammed ben Said al Borjali at the expiration of the time allowed by the court for answer in the suit now pending between the parties, this bond to be a valid lien on all his property, freely consented to. Acknowledged before witnesses, at request of the parties, proving competency and identity, 28th of Rabi, year 1335. [Signatures] Praise to God! Filed [judge's sign-manual]. Praise to God! Certified to be of record [another judge's sign-manual]."

In the meantime, some of the witnesses recorded as joining in the inquest had denied taking part in it:

[9. *Repudiation by Certain Witnesses.*] "The six persons whose names follow affirm that they know [the plaintiff] Abd al-Kader ben Bu Salham al-Borjali of Tazutha, but that they never knew his father, nor what estate was left by him, and that they never gave any testimony on this subject [as in No. 4 above]. The first-named adds that during the past three years he never has been at Sale, nor the second named for two years past. [Names of the six. Signs-manual of the judge at Kenitra, and of the notaries.]"

This denial led to the main dispute of law; on which the following opinions were now secured by the respective parties:

[10. *Opinions, or Briefs, of Counsellors.*] [*a*] "*Opinion* [*for the Defendant*] *of Al-Jilani ben Ahmad ben Ibrahim, of Rabat.* The inquest of neighborhood repute, copy annexed hereto [No. 4 above], offered to prove the death of Bu Salham ben al-Jilani and the property of his estate, is marked by improbabilities. In the first place, it is difficult to believe that any twelve persons could all have known nine other persons, dying one after the other, with their wives and children. In the second place, four witnesses have recanted their testimony; one even affirms that he had never been at Sale for some years and therefore could not have given testimony there at the date named. Now, an inquest thus defective is void. Authorities: the Miyar of the jurist Wancharisi [about A. D. 1500], the Tabsira of the jurist Farhun [about A. D. 1400], and the Tohfa of the jurist Hasim [about A. D. 1400] [giving citations]."

[*b*] "*Opinion* [*for the plaintiff*] *of Al-Hashmi ben Kadra.* (1) The document annexed in copy herewith, proving the death of the ancestor and the list of his properties, is valid and sufficient proof in law; for it contains all necessary elements, viz., knowledge of the fact of decease, knowledge of the specific properties, and the oath of the witnesses. The inquest is indeed not accompanied by a confirmation after separate questioning [as was No. 6 above], which is designed to verify the testimony. But the precedents show that such a proceeding of confirmation is not necessary after the lapse of six months; see the Amal of al-Fasi [a jurist of about A. D. 1680.] Moreover, this inquest contains nothing improbable. It is not improbable that persons of the same tribe and locality should know about the deaths of nine persons occurring at not long intervals. (2) The document produced in support of the allegations of claim [No. 6 above] is equally valid. The repudiation by several witnesses

is not to be credited. And to deny having deposed is not to retract a deposition once made. It is not correct to hold that if one of the witnesses joining in an inquest fails, the inquest is void. The number required by precedent is twelve; six witnesses in an inquest being equivalent to one regular witness [and two regular witnesses usually suffice]. See the Amal of al-Fasi, citing the opinion of the jurist of Fez, Abu Abdallah Mohammad Ibn Jilal al-Kabir [about A.D. 1580]. (3) It cannot be required that this inquest fulfil the strict requirements for proof of title [by deed]; the present claim is not one of title by deed, but of inheritance by kinship. (4) As to the boundaries given for the garden and the plots of land, they can readily be described more accurately, either by the same witnesses or by others."

[*c*] *Reply-Opinions* [*for the Defendant*]

"*Opinion of Al-Jilani ben Ahmad ben Ibrahim, of Rabat.* Praise to God, who has made knowledge the lamp to guide our feet, and may blessings light upon our prophet Mohammad, his family and his disciples. The inquest of neighborhood repute, copy annexed hereto [No. 6], reciting that at the death of Bu Salham of Tazutha his estate came into the hands of his son Said named therein, and enumerating 1 tent with accessories, etc., etc., is contradicted by eight witnesses, who deny having given such testimony. One of them adds that he has never even been at Sale for several years past, and therefore never gave such testimony, either before the officials therein named or any others. This fact is proved by two documents annexed hereto. Now since the majority of the witnesses have repudiated their testimony, and only four adhere to it, the inquest is void in law. It is said in the Miyar al-Jadid [dating about 1900] by the jurist al-Wazzani (whom God preserve!): 'The following question was put to the jurist Abu-l-Hasan Ali ben Kasim ben Kaju [living about A. D. 1550]: "The witnesses to an inquest of neighborhood repute, on being separately questioned, contradict each other and the majority or the minority of them retract their testimony;

should full evidential force be given to the oaths of the others? The judge Musa as-Sidi, while he was judge at Tetuan, held that proof by inquest is ineffective if a single witness retracts; much more so, then, if more than one retracts; and I need bring no other citations to that effect. I ask your worship for a clear answer on this point." He answered: "The principle is that the only testimony acceptable as legal proof is that of a certificate by two notaries, whose standing is unblemished; for the word of God says, Take for witnesses those of you whose standing is unblemished"; see the verse. But necessity has compelled us to accept other testimonies as equivalent to the notaries' certificate. The number of such other witnesses in practice (God knows best!) is twelve, and this is the lowest number allowable for such witnesses swearing together. If one of these twelve fails, the indispensable number is lacking, the remaining ones are ineffective, and the principle of proof is not satisfied. God knows best!—To sum up: The majority of the witnesses having retracted, and formally repudiated their testimony, and the only remaining testimonies being a minority, the inquest has no probative value. Opinion by the humble sinner al-Jilani ben Ahmad ben Ibrahim, of Rabat, to whom may God be merciful!"

"Opinion [for the Defendant] of Abd ar-Rahman ben Nasir Brithil.[26] Praise to God [etc., as above]. I add that the answer given by the foregoing counsellor (whom God preserve!), as to the inquest by neighborhood repute, declaring it to be void and of no value, is entirely sound; for the denial of the eight witnesses that they made oath is equivalent to a retractation. The jurist Ibn Abu-l-Kasim as-Sijilmasi [about A. D. 1780] was once inquired of on a case which educed this answer: 'The fact stated that the witnesses, named in the document annexed, denied having given testimony in the inquest copied herewith, suffices to annul the said inquest and to deprive it of probative value. It is said in the Miyar [dating about 1500]

IX. 26—Brief of Counsel for Defendant, 1916

that the witnesses' denial of the very fact of testifying is equivalent to a retractation. Now the retractation of a testimony before it has been acted on by the judge nullifies the testimony. This principle is unquestioned.' The above answer is recorded by the jurist Al-Wazzani in his collection of opinions [about A. D. 1900] known as Al-Kobra. Now since eight of the testimonies are void, there remain but four; and the precedents require twelve in such cases,—never less. Ibrahim al-Jilali was asked, as to the number of witnesses in an inquest, whether it was valid if only one notary and six ordinary witnesses joined; he answered: 'The lowest number required by the precedents is twelve; six ordinary witnesses are equivalent to a second notary. Such was the practice at Fez in the days of the masters who are our guides.' This text is found in the commentary on the Amal of Al-Fasi [about A. D. 1680].—Other reasons for holding valueless this inquest are its obscurity and inaccuracy. Its purpose is to prove the allegation of the attorney for the plaintiffs that Bu Salham owned the tent and other property and that he left it all in the hands of his son Said. Now the inquest, in point of proof, does not satisfy the rule for proof of property as laid down in the Lamiya [by Abu-l-Hasan, about A. D. 1500]: 'Possession under color of title for a certain period, such as ten months, and undisputed, raises a presumption of ownership'. And Abu-l-Hasan (citing authority) said that 'witnesses before testifying must show that they have knowledge (which few do have) of the material facts; otherwise, their testimony cannot be received'. Note also that 'furnishings and accessories', as stated in the inquest, and other expressions, are too indefinite.

"To sum up: The inquest in this case is void in law, for the reasons above stated, and proves nothing.—Opinion written by the servant of God Abd ar-Rahman ben Nasir Brithil, on whom may God have mercy. Amen.—End of the copy; compared with the original and found correct."

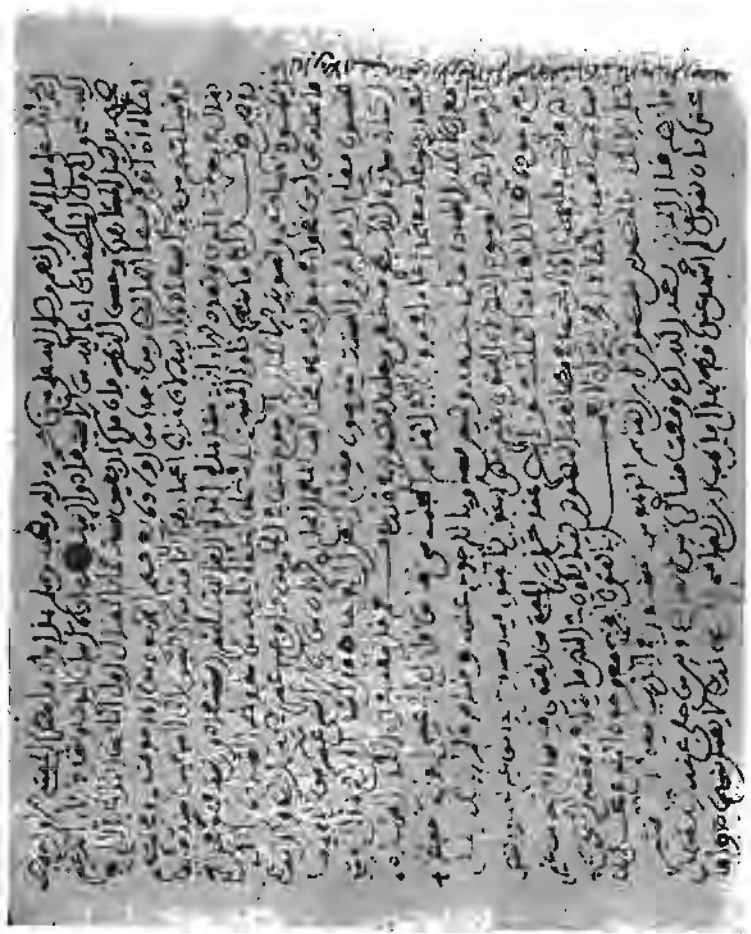
[d] "Opinion [for the Plaintiff] of Mohammad at-Thiyyib an-Nasiri.[27]

"Summary. The arguments in the foregoing opinions are unsound. (1) The inquest proving the fact of death and the list of heirs [No. 4, *ante*] has nothing improbable in it. It is quite natural that even after forty years persons of the same district, place, and tribe should still have knowledge of such matters and be able to make oath to them. Moreover, the witnesses are all between sixty and seventy years of age. (2) It is not correct to maintain that a denial of the fact of testifying is equivalent to a retractation. The analogy is not sound, without authority to support it; and the authority is the other way. It is said in the Dur-an-Nathir: 'According to Al-Mazari [about A. D. 1136] if a judge certifies that a witness deposed before him and the latter denies this, the denial will not be credited'. So too Ibn Hilal [about A. D. 1050] says that a denial of the fact of testifying, after judgment rendered, is not a ground for setting aside the judgment. (3) The inquest is not offered to prove ownership, but to prove relationship as next of kin. —Signed, Mohammad at-Thiyyib an-Nasiri."

Then comes the Judgment of the Court:

[11. *Judgment.*] "Judgment of the Kadi of Sale, 17th of Shawal, year 1335 [Aug. 6, 1927].

"Praise to the one God! Mohammad ben Ahmad ben Sliman at-Tunsi, acting for Abd al-Kader ben Bu Salham at-Tazuthi as-Slawi and his mother Aisha bent al-Yamani, of the same place, by virtue of a power of attorney, being document No. 10 in this record, has brought suit on behalf of his clients to the inheritance of Al-Yamani, of Bu Salham, and of Rahma, children of one Bu Salham, claiming their share in the latter's estate, to wit . . . . [here the judgment recites with particularity the goods and lands forming the estate]; alleging that the whole remained in the hands of Said ben Bu Salham [a son of the original Bu Salham], that on the death of



IX. 27—Reply-Brief of Counsel for Plaintiff, 1916

Said, the whole came to the hands of [the defendants] his children Mohammad, Al-Miludi, and Mansur; and asking that the property be sequestered, and that pursuant to law a partition be made of the estate and an allotment of the profits and increase thereof accruing since the death of Bu Salham al-Jilani some forty years ago; the foregoing claim contained in the statement of claim dated 6th Safar 1335, being document No. 8 in this record.

"The attorney for the plaintiffs proved the death, first, of Bu Salham ben al-Jilani, and then of his children al-Yamani, Bu Salham, Rahma, and Said, and the list of his properties, as set forth in document No. 9 herewith.

"The attorney at-Thahar al-Akrishi, in the name of the defendant Mohammad (the latter acting under a power given by the defendants al-Miludi and Mansur, as set forth in documents Nos. 1, 3, and 4, copied in file No. 8 herewith), replied to all the allegations in the statement of claim by denying them, as shown in the two entries indorsed on the said complaint.

"The attorney for the plaintiffs produced a document proving the allegations as to heirship, being document No. 5 herewith. The period of the defendants' enjoyment of the fruits and profits of the estate, as alleged in the statement of claim, was proved by the admission of the defendants' attorney made at the hearing, viz., that Bu Salham ben al-Jilani, the first ancestor deceased, died about forty years ago, as alleged in the statement of claim.

"Furthermore, the furnishing of the tent, with its usual accessories, was proved by two experts, Abu ben Hamman al-Amri al-Muslimi and Ahmad ben Mathala al-Amri al-Ayyadi, who are known by sight and by name to the two notaries and whose families are also known to them. The said experts testified before the magistrate (whom may God direct aright!) in the presence of the two said notaries, that by custom of the nomad Bedwins a tent and its accessories include two camping sacks, skin cushions with wool

filling (spun or otherwise), one wooden platter, one pitcher, one brass pot, some small jars, sieves, bowls, one woolen coverlet, one bed and accessories, cloth tent-doors, mats, a rug, and a kettle. These testimonies were based on an average custom and reasonable sizes.

"The magistrate then called upon the attorney for the defendants to present proof and arguments, and assigned one month's time for this purpose, requiring first a bond to execute any judgment, as shown by indorsement on document No. 7 herewith. The said bond was duly filed as shown in document No. 11 herewith. At the expiration of this period, the attorney for the plaintiffs produced a document showing the boundaries of the garden and the plots of land, supplementing the description given in the statement of claim.

"The magistrate (whom may God direct aright!) then called upon the attorney for the defendants to present any objections and evidence, and to take copy of the above documents, as shown in document No. 1 herewith; but the said attorney advanced no valid objection, and the assigned times expired without the defendants having produced any material evidence or argument.

"The magistrate, being the wise and eminent jurist who is judge at Sale (whom may God render worthy of respect for his obedience!), now enters judgment against at-Thahar al-Akrishi, attorney for the defendant, and Mohammad his principal, and orders that they deliver to the plaintiffs, Abd al-Kader and his mother Aisha, the share due to the latter in the estate of al-Yamani, Bu Salham, and Rahma, by virtue of their rights in the estate of their said father Bu Salham al-Jilani, consisting in the properties described in the statement of claim.

"This judgment is founded on the opinions given by the counsellors as to the proofs of succession produced to support the statement of claim; said opinions, contained in document No. 2 herewith, set forth correct principles and are founded on the authorities.

"Likewise, the magistrate (may God guide him aright!) adjudges that at-Thahar and his principal Mohammad deliver to the plaintiffs the due share in the fruits, profits and increase of animals and lands during the period aforesaid.

"This judgment is entered after calling upon the defendants in due form, 'Have you anything else material to say?', and receiving a negative answer, being an admission that they are unable to refute the proof made by the plaintiffs and that the date of the death of Bu Salham the first deceased ancestor was about forty years ago as alleged.

"Final judgment to be executed.

"Entered in court before competent witnesses this 17th of Shawal year 1335. [Signs-manual of two notaries and the judge of Sale.]"

The following opinion on appeal serves to complete the picture; for though it was rendered in another lawsuit three years earlier, it deals with the same principle of law and well illustrates the use of authorities and precedents by the Court of Appeal; note that the citations range from jurists of seven centuries ago down to the latest modern commentaries, and that no statute is cited:

[12. *Opinion of the Court of Appeals.*] "Decision given on the 26th of Shaban year 1332 [July 20, 1914] by the Minister of Justice and the Court of Appeal in the case of Ibrahim Burekka's Heirs against Ahmad ben Bu Azza ash-Shahlawi.

"The attorney for the heirs of Ibrahim Burekka alleged that Squire Ahmad ben Bu Azza ash-Shahlawi, known as 'the American', dispossessed the said heirs, his principals, of two parcels of land, known respectively as Faddan al-Kabir and Katha-hat at-Twirs, described in the statement of claim; that he refused to make redress;

that his principals had duly made proof of the wrong; that due notice of this proof was served; and that the two parcels have been sequestered pending further proceedings. The judge at Safi, after hearing the parties, awarded the two said parcels to Burekka's heirs and adjudged that they be put in possession as of the date of the judgment, ordering the defendant ben Bu Azza to surrender possession, to restore the fruits received during the period of disseisin, and to reimburse the expenses incurred by plaintiffs from date of disseisin to date of judgment. The judgment recited that the defendant Ahmad ben Bu Azza had failed to make any valid defense, and relied on two opinions filed by counsellors of Marrakeesh.

"On date of 2d of Jumada, year 1332, the defendant Ash-Shahlawi filed an appeal against this judgment. The parties argued before the Court of Appeal, consisting of the learned jurist Mulay Ahmad ben Mamun al-Belghithi, member of the Council, and the learned jurists Ali at-Tagrawi and at-Thaleb Manino, deputy members sitting in place of two other judges disqualified. The Court of Appeal concluded its deliberations in the middle of the month Shaban year 1332, and came to the conclusion that the judgment taking these two parcels from the disseisor and ordering him to restore the fruits received during his disseisin, was correct, even though neither the decision, nor the opinions [briefs] on which it was based, sufficiently set forth the principles leading to the repudiation of the arguments of the defeated party, viz., Ash-Shahlawi.

"It is therefore necessary to state those principles.

"The heirs of Burekka produced (1) a deed, purporting to sell to their ancestor the land in question, by Ahmad 'the American' and the other heirs of his father; (2) a certificate by two notaries finding the disseisin of the said land by the said Ahmad and his unlawful tilling of it. The American produced (1) an inquest of neighborhood repute attesting continuous ownership by his father and heirs; but these witnesses stated that they knew nothing of a sale by one of the heirs; (2) copy of a deed of partition of the father's estate,

executed by the defendant and his co-heirs, by which the parcels in issue were allotted to certain of them; (3) depositions showing that defendant was absent elsewhere at the time of the alleged sale.

"After consideration of these documents, this court (whom may God aid and keep!) is of the opinion that Ahmad undoubtedly with his co-heirs, did make the sale, and that the deed of sale is not overthrown by the testimony to continuous ownership.

[1] "This latter document states that the witnesses knew nothing of a sale. But their ignorance of a legal transaction does not raise the necessary inference that the transaction did not take place. Many acts are done for which there are no witnesses. In this case the fact of sale is proved by the formal document certified by two notaries. It is not a case falling within the principles that govern two conflicting testimonies. Such is the view of Ad-Dardiri [about A. D. 1780] and of his commentator Ad-Dasuki [about A. D. 1800], and it is equally in accord with At-Tasuli in his commentary on Az-Zakkak [about A. D. 1500]. There could only be conflict of testimonies if the witnesses had positively contradicted each other on the fact of disposing of the property. Supposing that there had been competent witnesses for the defendant denying the sale, then and then only would the question of choosing between them be presented.

[2] "It is well settled in the law that testimony to an affirmative fact outweighs testimony to a negative fact; and here the plaintiffs' testimony affirms the sale. Az-Zakkak says, 'Testimony to a sale of property outweighs the presumption of continuance of a state of facts'. So that the notarial document reciting the presence of the vendor at the sale must prevail over the testimony to the vendor's absence. It is said by Khalil [the great authority quoted *ante*, p. 555], 'The greater trustworthiness of witnesses, not the greater number, is a ground for decision'; and the more so here as the recital in the deed tends to affirm the fact of the sale, while the testimony of the witnesses to the vendor's absence tends to negative it; for in

such case testimony to a positive fact prevails over testimony to a negative one. In a comment on the topic of Khalil, 'in a case of anathema, or of paternity attributed by a Moroccan to a Levantine', Az-Zarkani [about A. D. 1700] said: 'If a party produces testimony that a named man at a certain time killed another, and the other party produces testimony that the same person at the same time was seen at another place at a distance, the testimony to the fact of killing will prevail, because it is an affirmative fact'; and he adds, later on, 'The testimony to the killing will prevail only if the witnesses to the alibi are not numerous enough to give their testimony an indisputable effect.' Now in this case the twelve inquest-witnesses cannot be considered numerous enough to have that effect, because they count only for two notaries [and the plaintiffs' certificate was made by two notaries]. Hence, the two notaries prevail, because of their higher trustworthiness; pursuant to the above quoted maxim of Khalil, that 'the degree of trustworthiness, not the number of witnesses, is a ground for decision'. The jurist Al-Hatthab (about A. D. 1550), commenting on Khalil's passage about reconciling contradictions, says, 'If witnesses affirm that a person made an admission in their presence, at Arafa on the day of pilgrimage there, that he owed another person one hundred dinars, and then if other witnesses affirm that this person was with them on the same day at Cairo, the testimony of the former will prevail'.

[3] "As to the deed of partition [between the defendant and his co-heirs], it is not inconsistent with the fact of sale; for the heirs could have made the partition first and the sale later. Besides, the alleged deed of partition is contradicted by the defendant Ahmad's own evidence of the continuity of ownership; for a partition, by assigning to each person a separate share of the land, would have destroyed the continuity of ownership; for a partition is a form of alienation, according to Khalil and other authorities.

[4] "As to the testimony of the notaries and the inquest that the defendant Ahmad ash-Shahlawi is a man of substance, of good

character, and never known to have done evil (this testimony being offered to rebut the plaintiffs' testimony that he was a man brutal and unjust to the helpless, and that in this case particularly he had done a grievous wrong to the plaintiffs), it may be remarked that the testimony produced by the defendant does tend to prove his high moral character, while that produced by the plaintiffs tends to prove his bad character. Now on principle, the latter testimony should prevail. Khalil says, 'evidence of bad character prevails.' And in the Tohfa [about A. D. 1400] also it is said; 'Testimony impeaching a person, other things being equal, prevails over testimony tending to support his character.' This is so because the former is affirmative, the latter is negative; and, as already pointed out, affirmative testimony prevails over negative. Moreover, the testimony for the plaintiffs goes to a specific fact while that for the defendants goes to an indefinite fact. In the Miyar [a collection of opinions by Al-Wancharisi, about A. D. 1500], in his opinion on marriage, is given the following response by Ibn Allak to a question put: 'Testimony to a specific fact prevails over testimony to an indefinite fact; the authorities agree on this point.' In the Lamiya [of Az-Zakkak, about A. D. 1500] the very point of this case is anticipated: 'A precise testimony prevails over an inexact one.'

[5] "We conclude therefore that the said American must deliver possession of the two plots to the Burekka heirs and restore the fruits gathered, pursuant to Khalil's rule as to 'the products of a thing used' and to the passage in the Tohfa of Hasim [about A. D. 1400], 'The disseisor is bound to restore the value of the products taken and to give back the thing itself.'

"As to costs, the defendant Ash-Shahlawi must reimburse these also, if he has acted fraudulently, as proved by an admission or by incontrovertible proof. Now in the present case he has indeed disputed the plaintiffs' claim, and the law has given credit to his adversary's evidence. He maintained that he was not dishonest and did not appropriate the plaintiffs' property; and the law has found

him guilty and liable. But this does not signify necessarily that he was at bottom dishonest in the affair. A saying [of the Prophet] tells us, 'Though one of you may merely be more eloquent than another in his pleading, still I must judge the case by what I hear [without thereby pronouncing upon character or motives].'

"Such is our opinion, after examining the record and reviewing the issues. God—may his name be praised!—knows best what is true, and to him must we resort. 26th of Shaban, year 1332 [July 20, 1914]."

(III) Criminal Justice (The Divan)

10. But the system of law just described did not cover the whole of the administration of justice; it represented mainly the private law, or civil justice, as we should call it. There remained the divan, or personal justice of the sovereign, the Khalif, roughly corresponding to our criminal justice.

The Khalif held audience in his divan, or office; and in the court-yard leading to the divan of the palace[28] assembled and waited all who sought the justice of the Khalif. Any subject could apply in person to the ruler for justice upon a wrongdoer. The power to administer what our philosophers used to call retributive justice (or repressive justice) has always in Islam been appurtenant to the executive power; "the administration of justice," said an Islamic jurist, "is the most noble attribute of sovereignty." This prerogative of personal justice of the ruler is

IX. 28—Court-Yard of the Serai (or, Palace) at Stamboul

characteristic of all Islamic countries, modern as well as medieval.

This justice was more or less discretionary; hence come the many travelers' tales of the arbitrariness of Oriental justice,—illustrated also in the world-famous anecdotes, in the Arabian Nights, of the brilliant Khalif Harun-ar-Rashid. Harun's reign, the end of the 700's, has been called the era of Pericles for the Arabs. He was called Ar-Rashid, meaning, The Just. This personal justice of the ruler, in his divan, was in the long run sound, and was popular with the multitude; for it was the only real guarantee, in an autocracy, against the oppression of the poor and humble by the rich and powerful nobles or bureaucrats.[29] An Arab proverb declares: "The oppression of the Sultan for one hundred years is preferable to the oppression of his subjects by each other for one year." "Many times," says an English observer of the 1600's,[9] "when the oppressed subjects can have no justice, they will in troops attend the coming forth of the Emperor and by burning straw on their heads or holding up torches provoke his regard; who brought unto him by his mutes, he doth receive his petition; which oftentimes turns to the ruin of some of those great ones". And another English traveler of the same period confirms explicitly this aspect of the right of personal access and petition:[9]

IX. 29—The Sultan, or Khalif, on His Divan

"Now they of the Serraglio, which goe by his stirrop, have charge to receive such Petitions as are preferred to his Majestie, as he rides along: and many poore folkes, who dare not to approach nigh him, stand afarre off with fire upon their heads, holding up their Petitions in their hands; the which the King seeing, sends immediately to take the said Petitions, and being returned home into his Serraglio, reades them all, and then gives order for redresse as he thinks fit. By reason of which complaints, the King oftentimes takes occasion to execute Justice, even against the most eminent in place, before they are aware, without taking any course in Law against them; but causing a sudden execution of what punishment he pleaseth upon them. Which makes the Bashawes that they care not how seldome the Grand Signior stirres abroad in publike, for feare least in that manner their unjust proceedings and bad Justice should come to his eare."

This prerogative of doing justice in the divan is also delegated to every deputy of the Khalif or Sultan; and out in the provinces the Wali, or Pasha, or Governor, holds a court periodically. In the large cities, the Wali (or Governor) was accustomed (as we have all read in the Arabian Nights' Tales) to make the rounds of the principal streets, especially by night, accompanied by his police; he had the power to do justice promptly on the spot,—perhaps on a thief, perhaps on a murderer, caught in the act.

The spectacle at the divan in Stamboul, and the procedure of the Grand Vizir in the 1600's, when administering justice there on behalf of the Sultan—and under his very eyes, indeed—has thus been described by an eye-witness:[r]

"This Divan is called publike, because any kinde of person whatsoever, publiquely and indifferently, may have free accesse unto it to require Justice, to procure grants, and to end their Causes and Controversies, of what nature, condition, or import so ever they bee . . . . The Divan dayes are four in the weeke; viz., Saturday, Sunday, Munday, and Tuesday, upon which dayes the Chiefe Vizir, with all the rest of the Vizirs . . . . . all which aforesaid Officers, from the highest to the lowest, are to be at the Divan by breake of day.

"The Vizirs being come into Divan, doe sit within at the further end thereof, with their faces towards the doore, upon a bench which joyneth to the wall, every one in his place as hee is in degree . . . . . And in the middest of the roome doe stand all such as require audience of the Bench.

"Now being all come together, and every man set in his owne place, forthwith the Petitioners begin their suites, one by one (who have no need of Attorneys, for every one is to speake for himselfe) referring themselves to the judgement and sentence of the Chiefe Vizir, who (if hee please) may end all; for the other Bashawes doe not speake, but attend till such time as hee shall referre any thing to their arbitriment, as oftentimes hee doth, for hee having once understood the substance onely of the Cause (to free himselfe from too much trouble) remits the deciding of the greatest part to others . . . . . so that after this manner he doth exceedingly ease himselfe of so great a burthen, which otherwise hee alone should bee enforced to undergoe; reserving onely to himselfe that which hee thinketh to bee of greatest import and consequence. And on this wise they spend the time untill it bee Noone; at which houre (one of the Sewers being appointed to bee there present) the Chiefe Vizir

commands that the Dinner bee brought in, and immediately all the common people depart. . . . . .

"Dinner being ended, the Chiefe Vizir attendeth onely publique Affaires, and taking Counsell together (if hee pleaseth and thinketh it fit) with the other Bashawes; at last, he determineth and resolveth of all within himselfe, and prepareth to goe in unto the Grand Signior. . . . . and so they goe in unto the Grand Signior, to give account and make him acquainted with what hath passed concerning their Charge. . . . . .

"The Grand Signior's Predecessors were alwaies wont, and the present one sometimes, commeth privately by an upper way to a certaine little window which looketh into the Divan, right over the head of the Chiefe Vizir, and there sitteth with a Lattice before him, that he may not be seene, to heare and see what is done in the Divan . . . . . and by this his comming to that window, the Chiefe Vizir (who alwaies standeth in jeopardy of losing his head, upon any displeasure of the Grand Signior) is enforced to carrie himselfe very uprightly and circumspectly in the managing of his affaires."

11. A result of this personal justice of the ruler is to give an almost multifarious variety to Muslim criminal justice; for it takes on the local color of the varied races and regions.

In the Islamic dominions of France, England, and Netherlands, to be sure, criminal justice has in many regions been taken under the direct administration of those governments, and has naturally been given those European features which the dominant power deems desirable. Criminal codes have in some cases been framed on European models; for example, the Criminal Code for India was

drafted by Sir James Stephen when a member of the Legislative Council. The courts are in some dependencies staffed partly or wholly by Europeans versed in Mohammedan law and custom. Thus the Mohammedan element of law has been more or less diluted. An example of a trial in one jurisdiction of this sort may be taken from the account of an American eye-witness in the Dutch colony of Borneo:[s]

"The judge is officially styled President of the Native Court. His attitude of profound sincerity, his appreciation of the responsibility of his office, his dignity of demeanor, his refined personality, coupled with his scholarship and superior education, make him compare more than favorably with judges as we know them in the United States. His love of justice and innate reverence for law, so beautifully characteristic of the people of Holland, together with the dignified formality of procedure, brought to this simple courtroom the atmosphere of a temple of justice. . . .

"Since the defendant on trial was a Malay, the jury had to be made up entirely of Malays. . . . . In addition to the judge, or president of the court, the jury, the prosecutor and court attaches, there was, conspicuously seated, a distinguished, patriarchal gentleman—venerable, dignified, and kindly of face—his expression strikingly spiritual in character. I found, on inquiry, that he was a Moslem dignitary, a leader of his people and learned in Mohammedan lore, particularly the Koran. The paternal government of Holland requires, in all cases where a Malay or native Mohammedan is on trial for the commission of a crime, that he must have as his friend at court an adviser of the Mohammedan faith, who is there in a sort of 'in loco parentis' relation. . . . . The presence of this friend at court, a member and leader of his own religious faith,

is the inalienable right of every Mohammedan prisoner on trial here in Borneo. . . . . .

"The indictment in this instance consisted of ten pages of stilted legal phraseology, and was read aloud by the clerk of the court. The judge then asked the prisoner if he were 'guilty' or 'not guilty'. He pleaded 'not guilty' to each count of the indictment. He had been arrested for burglary, breaking into a tent, and breaking open a small chest in which the victim kept his best sarong and some other personal effects. In other words, the defendant was charged with stealing the sarong of his fellow workman. At the time of his arrest he made full and free confession to all the charges; but, as characteristic of criminals the world over, after having made a confession he denied it after thinking over his situation, and manufactured a defense while in jail awaiting trial,—a typical jail defense.

"The judge was extremely patient and gave the prisoner full latitude in his statements denying the substance of the confession. At the end of his denial he found himself quagmired—he had talked too much, explained too glibly, and his own statements did not tally with one another. . . . . .

"As the next step in the proceedings the witnesses were admitted. Up to this time they had been excluded from the court, thus giving the defendant free rein to tell his story to the judge and jury. The chief complaining witness, the victim of the theft, was first sworn, after the manner and in the formula of the Holland courts. But in addition to this, since he and the defendant were of the same Mohammedan faith and he was about to give evidence against a fellow Moslem, he was compelled to take the Mohammedan oath, which was administered by the friendly adviser, a representative of the church, instead of by the court. In its intonation, as well as its penalties for perjury, it was even more solemnly impressive than the Dutch oath. With face to the west wall of the courtroom (Mecca being west of Borneo) and the Koran

held over his head about two inches above it, the witness was made to repeat, word for word, the lengthy oath administered by the church patriarch. . . . . The prisoner, asked what he had to say, now replied that the testimony of the witnesses was all a lie.

"The prisoner, the witnesses, clerk, other court attaches and spectators, were then all excluded from the courtroom while the judge and jury, in the presence of the Mohammedan adviser, alone considered the evidence. The verdict was unanimous as to guilt. Court was then reconvened. Now comes the function of the official friend of the prisoner, the church adviser, who, up to this time, had sat silently through all the court proceedings, except when administering the oath to Mohammedan witnesses. He was respectfully asked by the judge what punishment should be meted out to the defendant just found guilty of the crime as charged in the indictment.

"With solemn dignity he arose, facing west toward Mecca, read aloud from the Koran, and then turned to the judge, saying: 'There is but one punishment for this offense, the guilt of which has been proven, the penalty as stated in the Koran, which is that the hand that did the stealing (in this case the right hand) should be cut off at the wrist.' As a true exponent of the faith he, therefore, recommended to the court that this penalty be inflicted on the prisoner. And this from the official friend (?) of the defendant! Having relieved himself of this pronouncement, the church dignitary took no further interest in the proceedings, other than to collect his fee at the conclusion of the hearing. . . . . .

"At the conclusion of the patriarch's statement as to the penalty laid down in the Koran, the judge got in some fine work as a representative of the government. Addressing the prisoner, he stated that, while the penalty he had just heard from the lips of his friendly adviser, is the one prescribed by the laws of the church, the good Queen Wilhelmina did not desire that any of her subjects, even the humblest of her colonial children, should be maimed or mutilated,

but wished them all to live in happiness and comfort; so that instead of ordering his right hand cut off at the wrist, he would sentence the defendant to one and one-half years in prison. When the sentence was passed upon him, the prisoner proceeded, alone, to the outer door of the courtroom, about forty feet away from the bench, where he was met by two awaiting bailiffs, outside. These manacled each of the prisoner's wrists with heavy steel bracelets, the two connected by a heavy chain, something like a log chain but with longer links."[30]

But there are vast regions still more or less independent, in which the criminal justice of Islam persists, with local traits and traditions. Let us rapidly make a few turns of this kaleidoscope.

IX. 30—Dyak Convicts in Borneo
Here Mohammedan law is applied under Dutch Judges

IX. 31—The Palace-Fortress at Riyad, in Nejd

There stands today a palace-fortress, in the city Riyad,[31] in the remote heart of the Central Arabian plateau, capital of the kingdom of Nejd, which till the World War had been visited by only few European travelers. The Sultan of Nejd, Ibn Saud, starting as ruler over the tribe of Wahabis, the most old-fashioned and puritanic Arabs, became the ruler of all Arabia;[33] for by 1926, in one of the repercussions of the World War, he had captured Mecca and redeemed it from King Hussein of the Hejaz, who was too advanced in modern ways. The Sultan of Nejd still does justice in his divan; and a modern traveler thus pictures the justice of Sultan Ibn Saud:[1]

IX. 32—Ibn Saud, Sultan of Nejd

Chief of the puritanic tribe of Wahabis, he became master of Mecca and ruler of Arabia

II. Justice in Arabia

"At all times people of the Nejd are happy in the enjoyment of the dominant virtue of his reign,—justice. The truth is that in Nejd as nowhere else in Arabia is the saying, 'Justice is the foundation of the State,' honored in theory and in practice. The justice of Ibn Saud! We hear the word on sea and on land as we travel to Nejd and through it.

"One of the first manifestations of justice is security. I have traveled five months in the heart of Arabia. Although my bags, with locks broken, were with the baggage-train, which was often ahead of us, and although among my men were several of the Bedu, nothing, not even a sheet of paper, did I lose. . . . . There is more security in the desert of Arabia today than there is in the big cities of Europe and America.

"How was the miracle achieved? By a return to the 'shar' (or religious law). What is the justice of Ibn Saud but the 'shar'—the Koranic law—the justice of the Prophet? The difference between the 'shar' in Nejd and in other Arab countries, however, is that in the former it is summarily enforced, without favor or discrimination. To the judge, as to the executioner, all guilty heads and all guilty hands are one.

"The Sultan is not without support in his maintenance of order. His governors imitate him, vie with him. One of these in particular has made himself famous in Al-Hasa—famous for his Roman justice.[33] Indeed, when Ibn Jiluwi, cousin of the Sultan and amir, or governor, of Al-Hasa, occupies the seat of judgment, he permits neither pity nor mercy to sit with him. He sits alone, and he has made the Square of Hofuf a place of terror.

"Some men of the tribe of Benu Murrah, who came one day to the palace in Riyadh for food and clothes, departed, after receiving them, in the direction of Al-Hasa and, finding a drove of camels on the way, made off with them. The herdsman complained to the Sultan in Riyadh, who despatched a majjab to Ibn Jiluwi. The amir, when the majjab arrived, sent out four hundred of his men, a

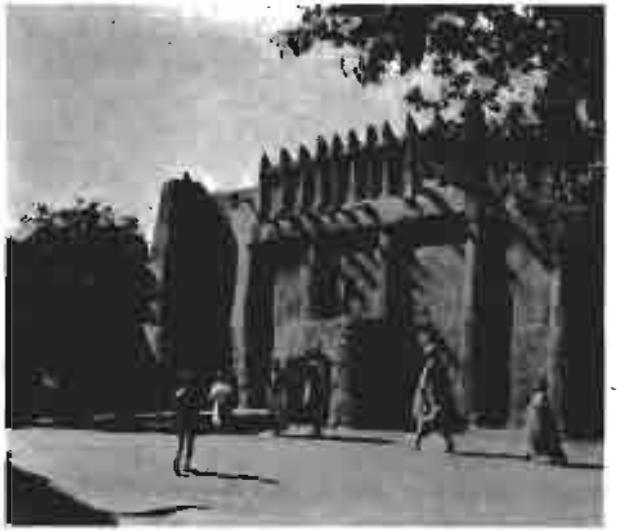
IX. 33—A Judge in Nejd
The white-bearded figure at the left, above, is a dispenser of strict justice in Nejd

hundred in each direction—north, east, south, west—to search for and capture the thieves. In less than twenty-four hours they captured also the stolen camels. When the Benu Murrah were brought before the Roman-Arab, there was a question, there was a reply, and there was the word: 'To the Square!' And, on the morning of that terrible day, the sword of the executioner flashed eight times in the Square of Hofuf, and eight heads of the Benu Murrah danced on the ground."

The Bedouin Arab tribes that occupy Africa between Cairo and Tripoli have a peculiar body of customary law of their own, without a written code, but as Mohammedans they observe Mohammedan legal principles in a general way. In this African area, the Senussi brother-

IX. 34—The Judge at Jalo, in the Desert

hood, a special Mohammedan sect, now exercises dominant influence; in the World War, its friendship was sought by both sides; but it was so strong in its self-protecting instincts that until after the World War only one European explorer had ever penetrated to the capital city, and he had barely escaped with his life. In the Senussi sect, the "ikhwan" is not only the teacher of the people, in religion and in general knowledge, but is judge and peacemaker between man and man and between tribe and tribe.[84] This Judge at Jalo studied as a boy under Sayed Ibn Ali el Senussi, founder of the sect; he does not rely upon records, for he can quote from memory all the events of his period, giving the year and the day of every incident. Jalo, where he dispenses justice, is the headquarters-town of the Majabra tribe, the merchant princes of the Libyan Desert.



IX. 35—KADI'S HOUSE AT DJENNI, NEAR TIMBUCTOO

Farther southwest in Africa, in the Sudan, at Djenni,[35] a city near Timbuctoo, one finds justice done in the simpler architecture of the desert; the country is old and has been Islamic for eight centuries. Still farther south, on the Equator, in Nigeria, where no Caucasian had penetrated until recent years, we come to the city of Kano, with walls forty feet thick, fifty high, and eleven miles around; it is the focus of Islam in West Africa; and here,[36] within these walls, we find a market-place, and on market days the magistrate holds summary court—like the old English pie-powder court—on the complaints of the merchants or citizens who have been defrauded. And, near by, in West Africa (French Nigeria) one may encounter a court of justice out in the open,[37] where a digni-

IX. 36—MARKET COURT IN KANO, NIGERIA

IX. 37—NATIVE COURT IN FRENCH WEST AFRICA

fied and uniformed negro judge dispenses justice informally to suppliants.

Crossing Africa, farther to the south and east, in Ruanda, near Lake Tanganyika, in Congoland, we find Sultan Msinga,[38] a ruler seven feet in stature, holding his audiences in the open, with armed attendants, in primitive garb; here the Islamic religion is as yet hardly more than a veneer.

Crossing the Red Sea, to the Yemen, in remotest Southern Arabia, one may observe the simple and un-

IX. 38—Sultan of Ruanda Holding Court

ceremonious manner in which criminal justice is dispensed by the judge.[39]

Vaulting over land and sea some thousands of miles to the extreme East, near the coast of the China Sea, we find a peculiar people, the Chams, practising Islam for six centuries or more, up in the hills of Annam,[40] where the magistrate does solemn justice in the steaming jungle.

Down in the East Indies, at Kedah and Johore,[41] we find Islamic Sultans ably ruling islands each as large as some of our states, and holding their own in the manners and accomplishments of modern Europeans; this Sultan

IX. 39—A Kadi of Southern Arabia

IX. 40—A Jungle Court in Annam

IX. 41—Sultans of Kedah and Johore

of Johore put on the British khaki during the World War.

It is in modern Persia and Afghanistan that this personal justice of the ruler seemed to survive to recent times most unimpaired in all its medieval Oriental directness, despotism, and flexibility. A few years past the chief of police, or wali, at Tehran, in Persia, might have been seen making his daily rounds of the streets with his executioners or bailiffs, doing summary justice on offenders caught in the act. And the Shah, when concerned about setting a warning example to pestiferous highway robbers or murderers, might have executed their leader by blowing him from the cannon's mouth.[a] In Afghanistan the ab-

IX. 42—Cannon-Execution in Persia

solute Amir, until recent times, did justice personally and with dramatic methods. A thief who pleaded hunger as an excuse was released and given employment; but when he stole again and was caught, he was hung aloft in an iron cage on a pole, forty feet above the river, to starve to death.[43] A butcher who sold bad meat was nailed by his ears to his stall, as a warning.

IX. 43—Starvation-Cage for a Food-Thief, Afghanistan

IX. 44—Ottoman Minister of Justice, 1911

12. In modern Turkey, however, we come back again to the modern citizen of the world; an example may be seen in Doctor, or Mollah, Nejmedin, Minister of Justice in 1911,[44]— a cosmopolitan jurist

representing the best results capable of accomplishment in the Islamic legal system. Turkey, indeed, with its cosmopolitan capital Constantinople, had been gradually occidentalizing its legal system for three generations past, by introducing Romanesque principles from the European codes, mainly in commercial law. But the new Turkish Republic has taken even more radical steps towards occidentalization. In April, 1924, the Assembly adopted a new constitution, abolished the old courts of Islamic law, declared the separation of law from religion, and replaced the old laws with a new group of codes founded explicitly on Romanesque European models.

Persia, too, is experiencing a similar occidentalization. American advisers have reorganized its financial system, and its civil law has been revised and codified under French auspices. Its new Parliament and its Ministry of Justice are presided over by cosmopolitan jurists; one of the most prominent contemporary statesmen, eminent as a jurist, Zoka el Molk, was Chief Justice of the Supreme Court and later (1926) Minister of Finance.[45]

Afghanistan has likewise entered upon the path of occidentalization. In the Amir Amanullah this sturdy nation of mountaineers found a leader who with the brilliant personality of a modern Harun-ar-Rashid undertook to re-fit his people for the changing times.

IX. 45—Persian Chief Justice

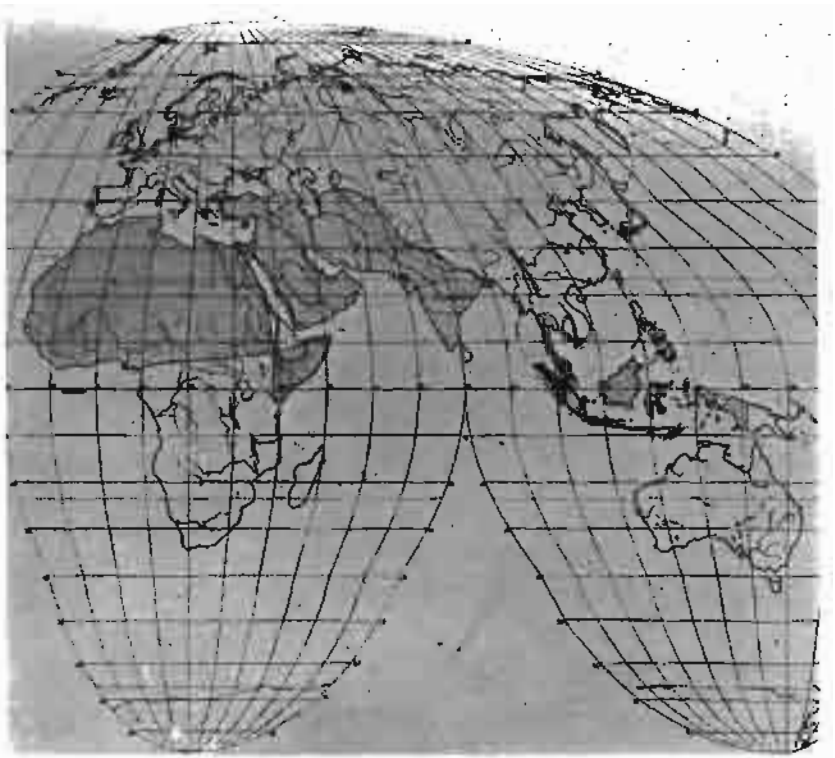
How soon and how deeply the ancient system of Islam in these countries will be supplanted in spirit and in practice, time alone can reveal. The same process of purposive occidentalization, with a view to conformity, began in Japan fifty years ago, and in Siam thirty years ago; and followed seasonably in China. In all these nations the general phenomenon is of the same type. On the one hand is the pressure for occidentalization, induced by the attractions of standardized Western commerce and invention, and by the contacts of Western international politics. On the other hand is the pressure of the spirit of nationality, and the conservatism of traditional morality and religion and ingrained popular ideas of justice. Whether the resultant of these forces will ever be a genuine transformation of institutions must be left to the historian of the future.

(IV) Retrospect

The Islamic system, of the three world-systems, is now the oldest extant in history; it dates back twelve hundred

years continuously. Looking back and out over the entirety of that system, we see it originating and developed by the native juristic instinct of the Arab race, but firmly accepted for centuries by many different races from Annam to Andalusia. One must acknowledge in it three remarkable features, two only of which it shares with the Romanesque and the Anglican systems. First, it has furnished a common language of education, government, and progress to peoples dis-united by scores of local languages; for the Arabic script prevails from West China to West Africa. Secondly, it has proved itself, as an instrument of social order, adaptable to do justice for hundreds of communities of variant local customs and institutions. And thirdly (in which it contrasts with the Anglican Christian system) it has leveled all distinctions of caste or color; Mongolian, Aryan, Semite, and Negro, white, black, or yellow, are all socially as well as legally equal in the brotherhood of Islam. In the Islamic world, a man's nationality depends on his religion, not on his ancestry. There are no barriers inside Islam, whether between priest and people, race and race, or class and class.

In the faith of this simple religion, some two hundred and fifty million souls still look to the sayings of Mohammed as the inspiration of their social duties and their legal rights; one human being in every eight of the world's



IX. 46—Map of Islamic Regions

This map aims to show only the broad outlines of the Islamic area, without noting the different types and degrees of the vogue of Islam, which are shown more exactly in the Appendix Map and Key

population is a Muslim.[46] And still, from Borneo to Morocco, from the cold prairies of Central Asia to the jungles of Equatorial Africa, the Muezzin on the summit of every one of thousands of mosques five times each day

IX. 47—The Muezzin's Call

calls the faithful to prayer:[a] "Allah akbar. La ilaha illa allah. Mohammed er-raisul allah. Jih hala es-salat. Jih hala es-salim". "God is great. There is no God but God. Mohammed is his apostle. Come to prayer! Come to salvation!"

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6. *Cordoba, Gate of Pardons.* From a view by the *McIntosh Stereopticon Co.*, Chicago.
7. *Cordoba, Mosque of Abderrahman.* From a view by *Señan y Gonzales* (Cordoba, 1902), No. 13.
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15. *Khalil Text.* From the title-page of the Paris edition (1900) of the "Mukhtasar".

16. *Mohammedan Deed 135 Feet Long.* From a photograph by Hanselman, Cairo, furnished by Hon. *Jasper Y. Brinton*, of Philadelphia, Judge of the Mixed Court of Appeal at Alexandria, who discovered the original after a search made for the author in 1926, by special permission of King Fuad, in the Royal Library at Cairo (Histoire Arabe MS. No. 1652).
17. *Professor and Class, Cairo.* From the illustration in *Walter Tyndale*, "Below the Cataracts", p. 66 (London, Heinemann, 1907).
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42. *Cannon-Execution in Persia.* From the illustration in the "National Geographic Magazine", vol. XXXIX, p. 435 (National Geographic Society, Washington), photograph by Roland Woods.

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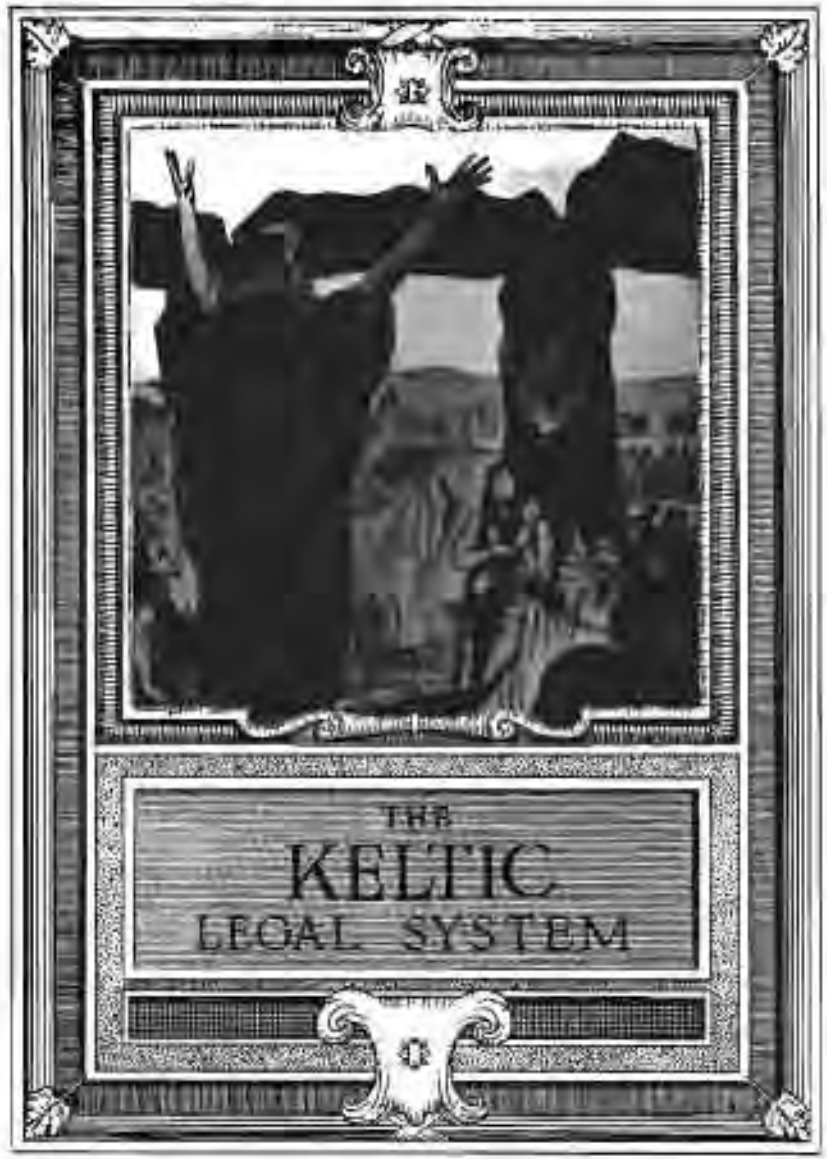
IV. *Note on Roman Law and Mohammedan Law.* The view has occasionally been advanced that the Mohammedan legal system not only borrowed some or many of its rules, but also took some or many of its general ideas, from the books and teachers of Roman-Greek law in the conquered regions of Syria and Mesopotamia in the 700's; so that originality is denied to the Mohammedan system, and its rapid development is explained as due to a building on the achievements of Roman law.

This theory is believed by the present author to be completely unsound,—for several reasons, not suitable for exposition here. All the characteristic features of early Islamic law are alien to the imperial Roman system, and are in close affinity with the other Semitic racial law, the Jewish.

The chief promulgator of the Romanistic theory is the great German Islamist, *Ignaz Goldziher;* his view is summarized, with citations to several other authors, in "Muhammedanische Studien", part II, par. VIII, pp. 73-77 (Halle, Niemeyer, 1890); and has been given currency in English by *Charles P. Sherman*, "Roman Law in the Modern World", vol. I, §§187, 188 (Boston Book Co., 1917).

There is little literature on this issue, and its solution needs thorough treatment by a scholar versed equally in Roman law and in Arabic and in Hebrew literature. The contrary view is supported by *Ernest Rénan*, "Histoire générale des langues sémitiques", 3d ed., p. 380. Mention of the controversy will be found in the works of *Savvas Pacha* and of *Griffini*, cited above.


THE
KELTIC
LEGAL SYSTEM

Prologue to Chapters X, XI, XII

The legal systems now to be described all arose and developed, in Europe, since the Christian era. In approaching the first three—Keltic, Slavic, and Germanic,—it must be recalled that at the time of the opening of the Christian era these races represented strong, untutored, illiterate peoples. They were so crude that they had not yet devised writing as a means of education and of record (except for the secret runes known only to the priests and a few chieftains). They lived wholly outside the pale of the great literatures of thought and experience built up and transmitted successively for four thousand years, along the Mediterranean coasts, by Egyptians, Babylonians, Hebrews, Greeks and Romans. They were vigorous and civilized; but they totally lacked records of their own customs and institutions. The map shows these illiterate peoples in white; the other regions shaded.[1]

Now the grand racial phenomenon of Europe, for the next ten centuries after the Christian era, was the gradual contact of these three illiterate races with the Mediterranean civilizations. This vast white area on the map is in its turn to become literate. The three new races gradually acquire writing. This is a stimulus to record their own institutions, and hence to formulate and to develop them. There is thus a testing of their comparative capacity to develop their native legal institutions.

X

The Keltic Legal System

(*I*) *First Period: Keltic Independence*

1. Conquest of Gaul by Julius Caesar.
2. Two types of Kelts—Political instability—Survival of the legal system in Wales and Ireland.
3. Druids as judges and repositories of the unwritten law—Carnac monuments—Druid justice.
4. Extirpation of the Druids.

(*II*) *Second Period: The Surviving Keltic Systems*

5. Stages of Irish legal history.
6. Primitive conditions.
7. King Cormac the legislator—The Assembly at Tara.
8. Judgments of the Brehons—The "Wrong Judgments" of Caratnia.
9. St. Pathric brings letters—The customs recorded.
10. Irish leadership in literature and learning.
11. The Irish law-books—The Senchus Mor—Law of distress, and of damage by pigs—Script of the law-books.
12. The Welsh law-books—Code of Howel the Good—The triads.
13. Contrast between Keltic and English legal ideas—James Lynch's Case.

(*III*) *Third Period: Dissolution of the Keltic System*

14. Llewellyn the Great—Magna Carta saves Welsh law—Henry VIII extirpates it.
15. Irish law abolished by James I—Causes for its overthrow—The Curse of Tara.
16. Daniel O'Connell and the Repeal—The Irish Free State, and the Irish Chief Court of 1924.

X. 1—Map of Europe Showing Literate Regions, A. D. 50
The shaded areas show the literate peoples at that period. The process of the next thousand years was the gradual extension of written records throughout Europe

X. 2—Vercingetorix Surrenders to Caesar
This surrender virtually ended Keltic independence in Gaul

X
The Keltic Legal System

THE history of the Keltic legal system falls naturally into three periods. The first, to Julius Caesar's conquest of Gaul and Britain, is the period of political independence. The second, to about A. D. 1500, is the period of independence of the surviving branches of the Keltic legal system, the Welsh and the Irish. The third period sees the final dissolution of these two.

CHART OF PERIODS: KELTIC LEGAL SYSTEM

B. C. 600 B. C. 50	I. Period of Political Independence
—A. D. A. D. 1400	II. Period of the Surviving Branches of the Legal System Welsh and Irish
A. D. 1500 A. D. 1600	III. Period of their Dissolution

(I) First Period
Political Independence

1. One of the most momentous days in all European history was the autumn morning in the 52d year B. C. when Vercingetorix and the united Gauls surrendered to Julius Caesar.[2] Caesar's victorious army had besieged Alesia (not far from Chaumont, where the American Expeditionary Force was headquartered two thousand years

composite race may be attributed the marked traits that have been noticed by observers in every age,—its emotionality, its imagination, its cheeriness, its wit, its quickness, its eloquence, its versatility, its affectionateness, its deep family loyalty; and on the other hand, its warm temper, its clannishness, its perpetual clan-quarrelsomeness, and above all its incapacity to unite itself under a stable government and to maintain its political independence.

From about B. C. 600 the Keltic tribes had come to settle all Europe west of the Rhine and the Alps, and south to the Apennines.[4] The Germanic tribes were then still dormant in the East and North. But after the Roman conquest, five or more centuries later, and the Germanic conquests another five centuries later, that is, about A. D. 700, almost the entire Keltic race had been subjugated and either extinguished or absorbed. There remained only four small areas where it survived in isolated and primitive purity—Wales, Ireland, upper Scotland, and Brittany. In Ireland it was the Irish Channel that protected them; in Wales and Scotland it was their mountain fastnesses, and to Snowdon Peak every Welsh king has retreated in time of distress. But these same mountains also served to keep the Kelts in their primitive tribal and pastoral stage.[6] Their sole

X. 5—A Mountain Kelt of Scotland

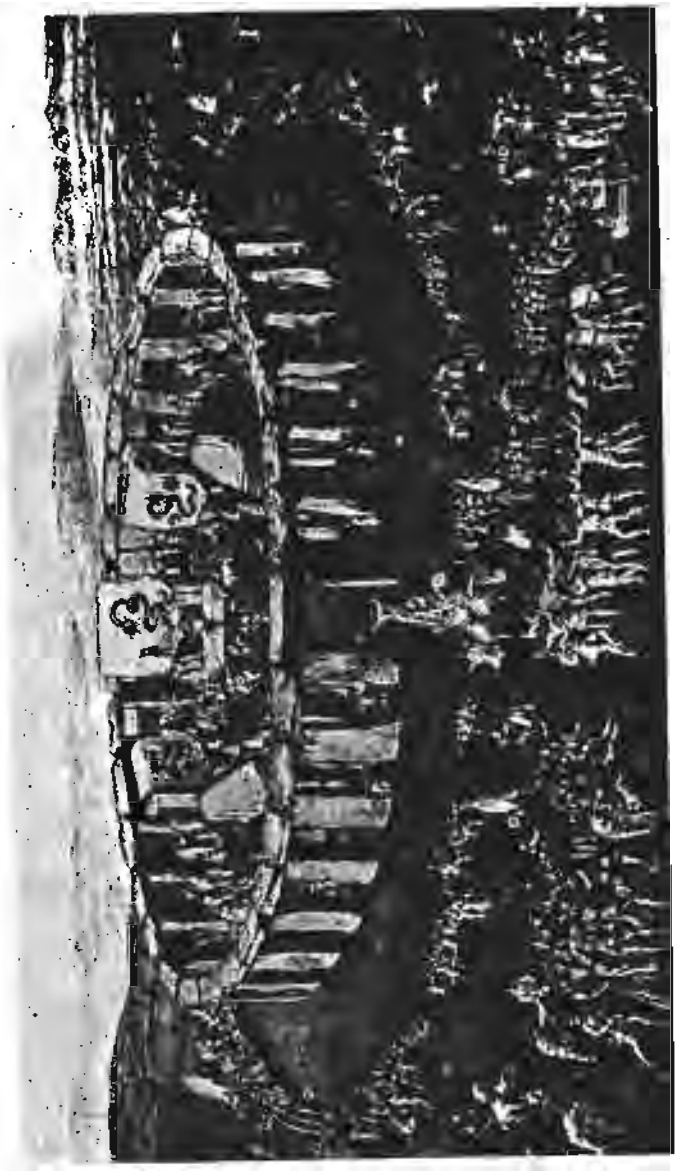
X. 4—Map of Keltic Race Settlements
The darkest shadings show the areas where Keltic peoples remained isolated till later periods

activities were cattle-raising and clan-warfare. They changed little in a thousand years; and they were fated economically to yield to the neighboring peoples who progressed in agriculture and commerce.

3. The Kelts possessed indeed a legal system, and a well-developed one. But in only two of these regions,

Wales and Ireland, did it ever reach the stage of written records, and then too late to save it. For its earliest known stage we have to depend largely on Caesar's account. He tells us of the Druids as professional dispensers of justice:[a] "Among the Gauls, the Druids decide almost all disputes, both public and private. If any crime is committed or violence done or any dispute arises over inheritance or land-boundaries, they are the ones who render judgment, and fix the compensation and the penalty. If any man or group of men fails to obey their decree, they excommunicate him, and this penalty is regarded as the most deterrent. . . . At a certain time of the year, in the Carnutian region, which is deemed the center of all Gaul, they assemble at a consecrated spot; and here, from every quarter, resort all who have disputes, and the decrees and judgments of the Druids are obeyed". Such is Caesar's account.

These stone alignments, the meeting-places of the Kelts, were typical of thousands of similar monolithic remains scattered all over Gaul and Britain. Stonehenge, near Salisbury,[s] is the best known and the best preserved extant in Britain. Although they doubtless have a prehistoric origin, they are associated in tradition with the Keltic Druids; and they must have served as the local meeting-places for the Keltic assemblies and the religious



X, 6—Stonehenge: A Primitive Popular Ceremony

ceremonies of the Druids. In their primitive religion, great stones played a mysterious part; there are three thousand of these stone dolmens in France alone. And even in modern times in Brittany a popular festival may be seen at these stone-monuments, paying reverence to the memories of two thousand years ago.

But among all the thousands of these mighty monolithic structures, the mystic center of the Keltic world was this plain of Carnac,[7] which Caesar calls the center of all Gaul, where the annual assembly of all the Druids took place. And the modern lawyer as he stands on this

X. 7—The Plain of Carnac

historic spot goes back in imagination, not to the Keltic legends of King Arthur and the Knights of the Round Table, and the enchanter Merlin, and the loves of Geraint and Enid, but rather to the Druid jurists.

For the Keltic race, with all its economic primitiveness, had developed a unique professional class, not exactly paralleled in any of the other legal systems. The Druid fraternity, that met at Carnac, combined the functions of priest, magician, teacher, physician, historian, bard, and jurist. These functions came to be divided among different groups within the fraternity; there was a long period of training neophytes; their knowledge was transmitted solely by memory, not by writing; and the graduates emerged as specialists in one or more branches of learning. The modern Welsh eisteddfod, or song contest,[8] is a revival of the ancient Keltic institution of the Druid bards; a chief bard, for example, was one qualified to recite at least three hundred and fifty tales of heroic history, with which to entertain the chieftains on the long winter nights.

Now the Druids, with their possession of all knowledge, were the real masters of the early Kelts; the tribal chiefs, or kings, were mainly their leaders in battle. The chiefs, or kings (in Gaul, the elders), did indeed possess the judicial power. In Irish legends the good king is often

spoken of as a just judge. As ruler, and as head of the family, or clan, the chief's leadership and prowess made him the source of what we should call state authority in

X. 8—An Eisteddfod Assembly in Wales
The ancient costumes and emblems are here seen restored to use

X. 9—A Druid Pronouncing a Judgment

all things. As in the Homeric Greek days, and in later Germanic days, the chief was "ex officio" the presiding officer at assemblies and courts. But the Druids were his advisers in matters of law and justice; and, as in all primitive systems, their spiritual and hieratic status was virtually one of control, in their field.

The Druid jurists, in Ireland, were known as "brehons", from "breth", a judgment. These Brehons were the repositories of the customary law. When they spoke in the assembly, their judgments were implicitly obeyed.[9] The Druids' power lay, not in physical or political force, but in their influence as priests of religion and magic; for the imaginative Keltic race has always been most susceptible to the supernatural, and especially to religion. The judgments of the Druids were enforced by their own magic powers; they excommunicated the disobedient, and their solemn curse was the deepest dread of the Kelts. Caesar has concisely recorded the effect of this interdict: "This penalty is the severest. When any one is thus excommunicated he is regarded as of the godless and wicked class. All men shun him. They flee when he approaches or speaks, lest, by contagion, they partake of his sorry lot. He can claim no justice for his wrongs, nor can he hold any public office."

But an unjust judgment recoiled, with its own magical retribution, on the judge himself. For some judges,

three large scabs would appear upon the face. For another judge, all the fruit would fall from the trees in one night. The most celebrated peculiarity was that of the Irish judge, Morann, who wore a gold collar; for when his judgment was just, the collar grew larger and fell to his waist, but if it should be unjust, the collar would grow smaller about his neck and choke him.

4. The Druids, as priests, presided at the sacrifices; and in pagan Gaul at least there were human sacrifices.[10] And this practice led to their political downfall. It was this practice which excited the horror of the Roman conquerors (who had themselves abandoned it scarcely a century before). Julius Caesar himself did not interfere. But his successors, Augustus, Tiberius and Claudius, a few years after the Conquest, in the first century A. D., not only suppressed the religion of the Druids, but exterminated the entire

X. 10—Druids Offering a Human Sacrifice

fraternity itself. Presumably the political influence of the Druids over the Kelts could no longer be brooked by their Roman rulers. Roman praetors replaced the Keltic Druids, and for four centuries thereafter justice was administered in Gaul and Britain, not by Druids seated on stone circles, but by Roman praetors in basilicas.[11]

Thus disappeared, with the Druid class, the Keltic legal system in Gaul and Britain. It had never been committed to writing; the Druids alone knew its rules; and not a vestige there remains. Only in Wales and Ireland do we know it, as a written system, in later times. This brings us to the second period of the system.

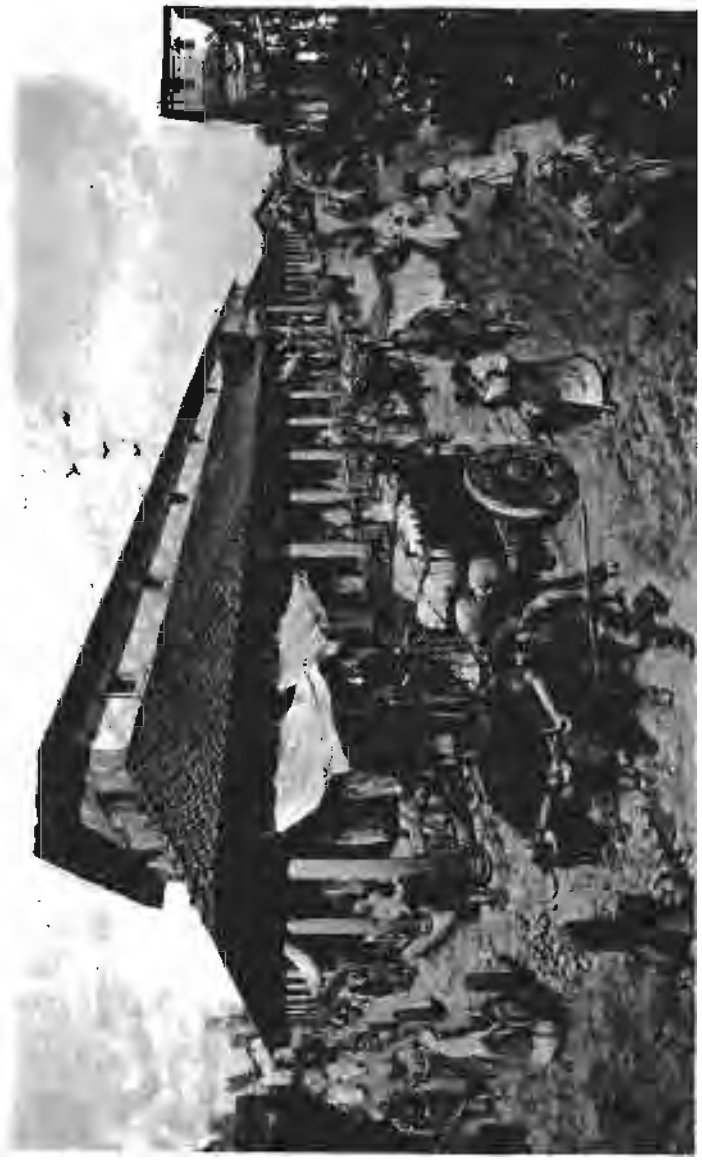
(II) Second Period
The Surviving Keltic Legal Systems

5. Of these two branches, the Irish was earliest recorded and most fully developed.

The Irish history may be summarized in four stages:

PERIODS OF THE IRISH LEGAL SYSTEM

Date	Period	Form of Law
To A. D. 400	Heroic Age of Pagan Druidism	Oral Transmission
A. D. 500 A. D. 700	Christianity and Intellectual Expansion	Formulation of Principal Rules of Brehon Law
A. D. 800 A. D. 1200	Invasions of Danes and Normans	Treatises and Glosses on Codes
A. D. 1300 A. D. 1600	Conquest by English	Brehon Law disappears



X. 11—Forum and Basilica at Silchester, A. D. 200
Roman rule replaced Keltic rule throughout Britain, and Druid justice disappeared

6. *Primitive Conditions*

In the first period, or Heroic Age, pagan Druidism still flourishes and the law is transmitted only by memory of the Brehon judges. In the second period comes Christianity, and the formulation of the written rules of law. In the third period the Danish and the Norman invasions gradually paralyze all political progress, but the Brehon jurists continue to practice their law. In the fourth period the political ruin of Ireland is followed by the disappearance of Brehon law.

6. But even had Ireland been spared by destiny from the Danish and Norman and English invasions, the Keltic legal system would probably not have proved equal to the needs of new times. It was originally and remained primitive, in the legal sense, because based on clan life, and not on political unity. A deep devoted loyalty to clan and chief, when transmuted into national patriotism (as it came to be with the Germanic peoples) makes one of the noblest human traits; but when it remains concentrated on family or clan, it merely hinders political growth. The Irish Kelts were essentially pastoral; their only wealth, besides their gold ornaments, was their cattle. Of these, the chiefs owned the most, and the clansmen, renting their cattle from the chiefs, were in large part virtually serfs; and many chapters of the laws deal with the procedure of suit by distraint of cattle. Besides cattle-

raising, the chief occupation was fighting between the clans and raiding each other's cattle. A chronicler's encomium of King Dermot tells us, "There was no man living that was richer in cattle and gold and silver, nor one that made more raids on his neighbors." In this heroic age of pagan Druidism, and long after, the hero is the good fighter and raider.[11] The mightiest darling of the Irish legends is Cuchulain, who fought to the death for four consecutive days with his friend Ferdiad; and they kissed each other at the end of each day's fight! For the spirit of fighting was not hatred; it was rather that of sport, dangerous adventure, and rivalry in manly prowess. It was a sociable thing to fight; in the west of Ireland a popular maxim still says, "It is better to be quarrelsome than to be

X 12—A Keltic Fighter

lonesome". From the earliest period down to the gentlemen's duels of the 1700's, Irish annals are full of anecdotes of friends fighting to the death, or if perhaps they survive, then shaking hands and embracing. And when that greatest of Irish patriots, Henry Grattan, denounced his bitterest parliamentary opponent as "an unimpeached traitor" (in the celebrated invective beginning, "Has the gentleman done?"), and a duel followed, the historian tells us that "the bloodshed brought about a reconciliation between the parties, who separated better friends than they had been for years"!

7. The most renowned fighting clan was the Fenians (whose name was afterwards taken by modern Irish rebels). The Fenians were the body-guard of King Cormac MacArt. Now this King Cormac MacArt, who lived about A. D. 250, was an historic character, and is important to us because he was revered as the first Irish legislator-king. "Cormac", says the early chronicle—and it is perhaps the first recorded Irish "bull"—"Cormac was absolutely the best king that ever reigned in Ireland before himself".

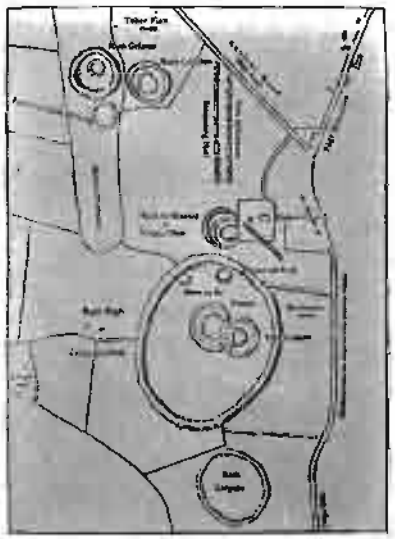
Cormac MacArt typifies the traditional golden age of Irish political annals. His capital was at Tara—the central spot, ever since, of Irish patriotic sentiment. In those days the hundreds of petty clan-chieftains were

grouped under five local kings, or "ri",—the kings of Ulster, Leinster, Connaught, Meath, and Munster; but these kings were under a chief king, or "ard-ri", who lived at Tara.

Tara was in the county of Meath, not so far from Dublin, the capital of the new Irish Free State.[13] And "dail", the name taken by the Parliament of the Irish Free State, is identical with "dal", the ancient Keltic name for the assembly that met at Tara for declaring the law. "There is a great use among the Irish", reported Edmund Spenser, "to make great assemblies together upon a rath, or hill, there to parley (as they say) about matters and wrongs between township and township or one private person and another." These periodical assemblies (and there were scores of places of assembly, every clan had them) were the focus of the people's life. Laws were enacted or modified, taxes were regulated, disputes were aired. There could be seen the Bards with their harps and eulogies; military drill and horse-races; fairs and feasting and merrymaking; for the assembly was the all-inclusive event of the season.

On the hill of Tara were many edifices. One of them, called the "forradh", was the meeting-place of the "dal"; and the similarity of "forradh" and "forum" is an evidence from etymology of the prehistoric common origin of

X. 13—Map of Ireland Showing Tara



X. 14—Ground Plan of Tara
The "forradh", within the large circular wall, was the meeting-place

Keltic and Latin races.[14]

8. But when an Irish king's assembly sat as a court, and listened to the judgments of a Brehon, it was usually called "ai-recht"; and the "Cul-Ai-recht", or chief court of Tara, was the court of last resort in Keltic Ireland. Three famous judgments, of this legendary period, may serve to illustrate how cattle-wealth and clan-fights were the staple material for the law.

The first is the judgment of the Brehon jurist Fintan. Fintan was one of King Cormac's judges, and the lawsuit was over the fight of two clans in the banquet-hall. The chiefs of the clans were Finn and Goll. Finn's clan had eleven hundred casualties, and Goll's lost only sixty-one. And the judgment of the Brehon in the suit for damages is that Finn was liable, for he started the fighting, but that he is freed from payment, having suffered such excessive loss in men![b]

The second judgment is that of Dermot, in the lawsuit

X. 15—The Book of Mcdurnan
One of the finest illuminated manuscripts for which the early Irish monks were famous

brought by one of the early monks against St. Columba the missionary. St. Columba had borrowed from the monk a fine manuscript of the Gospels,[15] and Columba had made a copy of the borrowed book, before returning it. The monk claimed the copy also as his; the saint disputed this. His argument in defence reads not unlike the defence made by modern infringers of copyright:[c] "I confess that the book in question was copied from the manuscript of Finnen. But it was with my own industry and toil and burning of the midnight oil. And it was copied with such care that Finnen's manuscript is in no way injured by the act of copying. Moreover, my object was to preserve more surely the best parts of the book and employ them for the greater glory of God. Hence I do not admit that I have done any injury to Finnen; nor am liable for restitution, nor am at fault in any way." But Dermot, the judge, as manuscripts were then new in Ireland, had no exact precedent, and he cast about for the nearest analogy. He found the Brehon maxim, "With every cow goes its calf", "Le cach boin a boinin"; and so his judgment was in favor of the monk, because "Le cach lebar a lebran", "With every book goes the young of the book". (But the saint, it is recorded, was very angry at this judgment, invoked the power of a rival chieftain against Dermot, and thrashed him well in battle.)

The third judgment is that of Cormac himself, before he became the great legislator-king. There was a lawsuit by one neighbor against another for the trespass of some sheep who had eaten all the woad-herb in his field. The people were assembled; and the judge was saying that the owner of the sheep should forfeit them to his neighbor, in payment for the herb consumed; when a youth (this was Cormac) started up from the back of the hall, and shouted: "Not so! For the herb is only the fleece of the earth. Therefore let not the whole sheep be forfeited, but only the sheep's wool be sheared, to pay for the herb; for herb and wool will both grow again". And the justice of this was so clear that the people shouted with one voice: "A wise young judge; he should be king". So they made Cormac a judge, and afterwards king.

The judgments above recounted, though perhaps reflecting well enough the spirit of Irish justice, are legendary only,—handed down in later chronicles of miscellaneous tradition. Contemporary records of the litigation—pleadings, judgments, arguments, reports of eye-witnesses—seem not to have been made. No such documents are extant, though copious must have been the oral pronouncements.

But there is extant one short book[9] which is a sort of digest, in very concise form, of decisions attributed to

X. 45a—The Oldest MS. of Irish Law
It contains a concise digest of "The Wrong Judgments of Caratius", a famous early Brehon

a famous early judge—Caratnia the Scarred, said to have lived in the second century A. D. And it so happens that the manuscript containing it is the oldest one bearing an Irish law-text; it goes back to the 1100's; and the text itself dates as far back as the 700's. These decisions are composed in one of the oddest literary forms ever contrived to stimulate legal thought. The judge states his ruling in abstract terms, which are apparently (to one familiar with the law) paradoxical and unsound; the king questions it; and then the judge explains that he was here on the facts applying an exception to the rule. This quaint and ingenious composition has only fifty-one short paragraphs, but its learned translator remarks that after interpreting it "one feels as though he had undergone a stiff examination in Irish law":[d]

[*The Wrong Judgments of Caratnia.*] "Here follow the wrong judgments of Caratnia the Scarred. He was from the North, and was judge to King Conn of the Hundred Battles. He acquired great wealth. But his people maltreated him and deserted him; and he went to Conn's abode and was there healed. This Caratnia was deemed to blunder, when his judgments were heard by the many; but his judgments were correct, when examined by the few. Every case that was brought to Conn would be submitted by Conn to him. Then Conn would ask him, 'What judgment seems meet to you?' [The judgments are now stated in dialogue between Caratnia and Conn.]

"1. 'I decided, A bargain, after a night has elapsed, cannot be revoked'.—'You decided wrongly', said Conn.—'I did it wisely', said Caratnia, 'for it was a silver thing, and its defect was concealed'.

"2. 'I decided, A contract for plowing with another man's oxen can be revoked'. 'You decided wrongly', said Conn.—'I did it wisely, for the other man's oxen were taken away from him'.

"3. 'I decided, The bard cannot claim pay for his hired eulogy'. 'You decided wrongly', said Conn.—'I did it wisely; for it was sly praise, which amounted to a sneer'.

"4. 'I decided, The tools of the smith descended to a relative not craft-skilled'.—'You decided wrongly', said Conn.—'I did it wisely, for the relative was his son, who has first claim'.

"5. 'I decided, A bondwoman wife must share the cost of her child's upbringing'.—'You decided wrongly', said Conn.—'I did it wisely, for the child's father was himself a bondman'.

"6. 'I decided, The surety for a son who contracts [without capacity] in his father's lifetime must pay'.—'You decided wrongly', said Conn.—'I did it wisely, for the contract was for purchasing a wife and hiring land'.

"7. 'I decided, An iron tool is acceptable as a pledge'.—'You decided wrongly'.—'I did it wisely, for this was a pledge to secure a liability for building a party-wall'.

"8. 'I decided, The contract is binding, though the thing received was of less value'.—'You decided wrongly'.—'I did it wisely, for every adult man must suffer being overreached'.

"9. 'I decided, The first choice of lands when an inheritance is divided lies with the eldest son-heir, without casting lots for it'.—'You decided wrongly'.—'I did it wisely, for in this case the younger yielded first choice to the elder without lots, even though it might be worse for him'.

"10. 'I decided, The stealing of a morsel may go free of penalty'.—'You decided wrongly'.—'I did it wisely, for here it was a homeless outcast who eat it'.

"11. 'I decided, For trespass by bees a pledge must be lodged with one's neighbor'.—'You decided wrongly'.—'I did it wisely, for no one need supply feed to his neighbor gratis'.

"12. 'I decided, The whole cost of the child's upbringing falls on the mother only'.—'You decided wrongly'.—'I did it wisely, for this was the child of a slut, which the father had not acknowledged before she sought to shuffle off liability'.

"13. 'I decided, Excessive advantages in family shares may be retained'.—'You decided wrongly'.—'I did it wisely, for here the spouses, though not bringing equal marriage portions, were entitled to spend equally for family expenses'.

"14. 'I decided, The gravid wife may be freed from a penalty'.—'You decided wrongly'.—'I did it wisely, it was a matter of saving life; the infant was not brought to birth'.

"15. 'I decided, One of the animals put out to pasture on hired land may be kept by the land-owner'.—'You decided wrongly'.—'I did it wisely, for the animal, being kept as pay, was not of greater value than the rent'.

"16. 'I decided, For breach of a clan-truce no fine need be paid'.—'You decided wrongly'.—'I did it wisely, for here the accused was wounding in defence of his life'.

"17. 'I decided, An overpayment may be pleaded against a debtor'.—'You decided wrongly'.—'I did it wisely, for here it was a surety and a creditor, who pursued their claim until the debtor yielded'.

"18. 'I decided, One oath makes good proof against two'.—'You decided wrongly'.—'I did it wisely, for the one oath was of a competent man who prosecuted two infamous men for a misdeed'.

"19. 'I decided, Harm by an animal is payable like harm by a human [i. e. the full penalty-amount, not merely compensation]'.—'You decided wrongly'.—'I did it wisely, for here the animal had

been kept by its owner after once doing harm and was notoriously vicious'.

"20. 'I decided, Harm by a human is payable like harm by an animal'. 'You decided wrongly'.—'I did it wisely, for harm by a minor or without intention calls only for compensation, not fine also'.

"21. 'I decided, Harm done by a shepherd-dog carries no penalty'.—'You decided wrongly'.—'I did it wisely, for here it was attacked by animals that it had not hurt'.

"22. 'I decided, The chief has not the power of judgment over his underlings'.—'You decided wrongly'.—'I did it wisely, for here the chief was disqualified as to his underlings'.

"23. 'I decided, Children's contracts are binding on both sides'.—'You decided wrongly'.—'I did it wisely, for here it was an exchange of goods, made openly and without overreaching'.

"24. 'I decided, A king's arrival [with ceremonies] does not excuse failure to fulfill one's attendance at court'.—'You decided wrongly'.—'I did it wisely, for here the king himself was to hold the court for this party'.

"25. 'I decided, The exemption of a bard's cattle from attachment for debts of his followers is lost'.—'You decided wrongly'.—'I did it wisely, because the bard's followers exceeded the lawful number'.

"26. 'I decided, The injured man, taken in with his followers by the injurer under his duty of treatment, need not be kept till the ninth day'.—'You decided wrongly'.—'I did it wisely, for a skilled physician pronounced that the man would be dead at the month's end, and the fine for death relieves the injurer from the usual duty to support for nine days'.

"27. 'I decided, Liability for death accrues against him who is commissioned by his family-chief to fight in a regular duel'.—'You

decided wrongly'.—'I did it wisely, for the man killed was feudal superior to the killer, and no necessity compelled the killing'.

"28. 'I decided, The clan does not share liability for the misdeed of one who by purchase became an adoptive member'.—'You decided wrongly'.—'I did it wisely, for here the conditions of purchasing membership were not fulfilled'.

"29. 'I decided, The son is free from the duty to support his father in old age'.—'You decided wrongly'.—'I did it wisely, for here the father had sold the son as a serf, and the duty to support had ceased'.

"30. 'I decided, On division of property at divorce, the wife receives no share representing the fruits of her household toil, in spite of her service having been faithful'.—'You decided wrongly'.—'I did it wisely, for here the wife had waived her right when marrying a man of higher rank'.

"31. 'I decided, A garment may be seized as a pledge'.—'You decided wrongly'.—'I did it wisely, for here the pledge was one required to be redeemed before nightfall'.

"32. 'I decided, The chief's share of head-money for killing of a clansman need not be paid'.—'You decided wrongly'.—'I did it wisely, for here there was a counter-claim due from him'.

"33. 'I decided, No fine is imposed for negligence on a bystander who by inaction causes the death of a helpless person'.—'You decided wrongly'.—'I did it wisely, for here the bystander himself scarcely escaped the same death'.

"34. 'I decided, The oath of a woman against a cleric is void'.—'You decided wrongly'.—'I did it wisely, for here the suit was by one cleric against another'.

"35. 'I decided, Of a treasure found no share goes to the rear man of those who chanced upon it'.—'You decided wrongly'.—'I did it wisely, for the rear man here was blind, who did not share the sight of it'.

"36. 'I decided, He who takes possession of land in good faith as claimant obtains permanent possession'.—'You decided wrongly'. 'I did it wisely, for the one dispossessed had neither ownership nor consent of the owner'.

"37. 'I decided, In a suit for injury to a chief, only one "cumal" [= 3 cows] was awarded'.—'You decided wrongly [for the head-money of a chief is 7 "cumal"]'.—'I did it wisely, for here the insult was to the widow of a chief, and she was the mother of seven chiefs; therefore each claimant received only one "cumal"'.

"38. 'I decided, To the woman who makes no outcry when forced, the fine is none the less payable'.—'You decided wrongly'.—'I did it wisely, for here she was forced in the wilderness'.

"39. 'I decided, No fine is imposed for improper seizure of a man's wife in the guest-house'.—'You decided wrongly'.—'I did it wisely, for a wife among the house-serfs without the protection of her husband is deemed for the time not his wife'.

"40. 'I decided, The deposit need not be restored'.—'You decided wrongly'.—'I did it wisely, for this deposit perished with the goods of the depositary'.

"41. 'I decided a case on hearing one party only'.—'You decided wrongly'.—'I did it wisely, for the opponent in this case could not be found, and I decided after considering his side'.

"42. 'I decided, The husband is freed from paying fine to the wife's family for causing her death'.—'You decided wrongly'.—'I did it wisely, for this wife was his by the family's consent and died in childbirth'.

"43. 'I decided, The bride-price is to be paid back to the husband even after consummation of the marriage'.—'You decided wrongly'.—'I did it wisely, for here the marriage was for a term and the wife had deserted the husband before the term expired'.

"44. 'I decided, The liability of a serf for a misdeed is shared by

another serf'.—'You decided wrongly'.—'I did it wisely, for here the other serf had harbored the first'.

"45. 'I decided, The man who brings complaint according to law is oathworthy'.—'You decided wrongly'.—'I did it wisely, for here his oath was fortified by one of the seven "rocks" of proof'.

"46. 'I decided, For a bard's song composed on the spot and therefore inadequate, the regular fee must be paid'.—'You decided wrongly'.—'I did it wisely, for this was a song to invoke magic and must therefore be extemporized'.

"47. 'I decided, The recaption of a pledge by the pledgor does not make him liable'.—'You decided wrongly'.—'I did it wisely, for this was a pledge unlawfully taken'.

"48. 'I decided, The pound for keeping a pledge seized may be outside of clan-territory'.—'You decided wrongly'.—'I did it wisely, for the seizer here acted for a creditor in the other territory'.

"49. 'I decided, A surety may repudiate the suretyship'.—'You decided wrongly'.—'I did it wisely, for this was a case where the man had been erroneously made surety against his will'.

"50. 'I decided, The chief cannot claim that his honor was injured, in spite of the bard's insulting song'.—'You decided wrongly'.—'I did it wisely, for here the chief then demanded a eulogy, and it more than made up for the insult'.

"51. 'I decided, No head-money is payable for a treacherous killing'.—'You decided wrongly'.—'I did it wisely, for here there was a set-off for seven deeds of violence on the other side' ".

9. The great King Cormac is said to have been the author of the earliest law-book, the Lebar Aicle, or Book of Aicill, a kind of criminal code. But 'twas not he that wrote it. That book must have been made centuries later. In Cormac's day, the Irish, like all Kelts, had no writing

X. 16—Pathric Causing the Irish Customs to be Written Down

and no written records. They had indeed the runes, called in Irish "ogham"; but these were only crude symbols, used mainly for burial inscriptions and the like.

The first credible reduction of the customs to writing came after Christianity had brought the Roman alphabet, and is attributed to St. Pathric himself.[16] He arrived in Ireland as a missionary about A. D. 430, and a few years later (perhaps A. D. 440) is said to have persuaded King O'Leary to authorize the ancient customs to be written down. This was done by a commission of three chiefs, three bishops and three Brehons, or jurists. The code was drafted at Tara, mainly by Dubhtach, the chief Brehon judge, and was duly approved by King O'Leary. It was afterwards known as the "Senchus Mor", or Great Custom,—a name like that of "Grand Coutumier" in Normandy. But in the early days it was often called "Cain Pathraic", or Code of Pathric. And at Tara, where it was done, a statue of the saint[17] now stands. Pathric, though a Kelt by birth, was a Roman citizen, and perhaps the son of a Roman magistrate; and he *may* have heard of the new code of the Roman emperor Theodosius, which had just been published in A. D. 438. But though it owes its origin to the arrival of Latin Christianity, the book is purely Keltic throughout. The entire Irish legal vocabulary was native Keltic, and highly technical, in a class by itself.

X. 17—Statue of St. Patric on Tara Hill

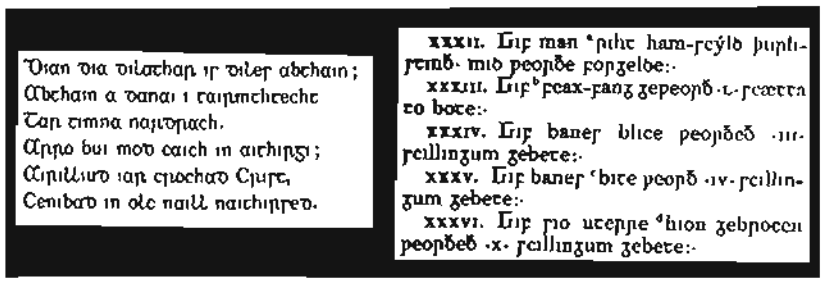
X. 18.—St. Columba Winning the Kelts

10. This early acceptance of Christianity by the Irish, under St. Pathric, and under his equally famous successor St. Columba,[19] came at a time when western continental Europe was being overrun by the pagan Germanic invaders. Christianity and Latin literature in Gaul were being overwhelmed. But the Irish had embraced the new religion with emotional enthusiasm. Whole clans were baptized at once.

The Irish now became the pioneers of religion and literature in Western Europe. As missionaries, they traveled and planted the Cross as far away as Italy. For three centuries, from A. D. 500 to 800, until the time of Charlemagne, Ireland was the intellectual centre of the West (as all authorities agree). It was the Irish monks who alone kept up Latin as a literature, not merely a language. And it was they alone who knew the Greek language. They multiplied manuscripts assiduously;

they were the first to use decorated capital letters; and the art of illumination was lovingly developed to an almost incredible degree. The Book of Kells,[19] a gospel manuscript, has been pronounced by some to be the finest example of illumination extant in the world; and the literary treasures of this period in Ireland that have been since destroyed by the wars are legion in number. The Anglo-Saxons of that day literally learned their letters from the Irish missionaries; and hence it happens, oddly enough, that the script of our earliest Saxon English law-books uses the Irish alphabet;[20] it looks foreign, but it is really only a modified Roman alphabet, with special forms for the letters *g*, *n*, and *s*.

11. In these three flourishing centuries, A. D. 500-800, the Brehon law entered upon its second stage. The Druid jurists, converted wholesale to Christianity,[e] and now acquiring the art of script, applied their trained pro-



Dian dia dilsthar ir dilet abchain;
Abchain a danai i tairmchrechte
Tar cimna nasidrach.
Arro bui mod caich in airthigi;
Airillsiud iar crochad Crist,
Cenbard in ole naill naichirred.

xxxii. Lif man [a]pihc ham-fcýlð þurh-
fcinð· mið peorðe forgelde:·
xxxiii. Lif [b]feax-fang gepeorð·i·fcætta
to bote:·
xxxiv. Lif baneſ blice peorðeð ·iii·
fcillingum gebete:·
xxxv. Lif baneſ [c]bite peorð ·iv· fcillin-
gum gebete:·
xxxvi. Lif þa uteſſe [d]hion gebroceñ
peorðeð ·x· fcillingum gebete:·

X. 20—Irish and Saxon Law Script, Compared
The Irish is at the left, the Saxon at the right

X. 19—The Book of Kells

fessional minds to the formulation of the law. The hundreds of precedents and rules which they had hitherto handed down by memory were now reduced to writing by the end of this period.

But the Senchus Mor, the Book of Aicill and the other Keltic law-books, were not legislative codes. They were rather treatises for the instruction of their student-apprentices; for there was an elaborate system of instruction, with numerous grades. The text of these Keltic books, both Irish and Welsh, contains few generalizations of principle; it never even approached the Roman height of Gaius. Chiefly, it lists thousands of detailed rules for concrete cases. And these cases were largely imaginary,—not actual judgments, but mere feats of logical exercise; and were arranged in artificial groupings with fanciful phrasings. The following passage, from the law of distraint, illustrates the general style; here the larger type shows the older original text, and the smaller type the later glosses or comments of various jurists or teachers:[f]

SENCHUS MOR, *Of the Four Kinds of Distress:* "For distress ('athghabhail') is a general name for every security by which every one recovers his right. 'Athghabhail' is that which renders good to the good, which renders evil to the evil, which renders good to the good, which takes the guilty for his guilt. The man who is attacked obtains 'eric'-fine.

[Gloss.] "*For distress* ('athghabhail') i. e. because it is a general name for every true perfect method by which one recovers what he is entitled to according to rectitude, i. e. that thing is 'athghabhail.' Whatever method it may be by which one recovers may be called 'athghabhail.' '*Which renders good to the good,*' i. e. good is rendered unto the good. '*Renders evil to the evil*', i. e. it renders evil to the person who does not do good with his possessions. '*Which takes the guilty for his guilt*', i. e. every guilty person is taken for his guilt when 'eric'-fine is not obtained. '*The man who is attacked obtains "eric"-fine,*' i. e. the man against whom the attack is made received 'eric'-fine according to the extent to which he has been injured . .

"Stays were ordained for distresses, and two notices were appointed for every distress without exemption and without defect; a notice of five days to the defendant, and a notice of ten days in the case of the inferior grade. If it be distress on account of a kinsman that is taken, they (the Feini) legalized the quadruple division of the notice for the distress, but they did not legalize stays or delays in pound, except a delay in pound of one day only. This thing was, however, afterwards changed forever, so that there are *now* four stays, and four delays in pound, and two notices.

"Notice precedes every distress in the case of inferior grade, but no notice is served on a wanderer, or one who has no fixed residence. Give five days legal notice before distress be taken from a defendant, if notice be served at all, that he may have his property in readiness for a pledge, for judgment, for consultation, for adjustment, for contracts. . . . . .

" '*Stays were ordained for distresses*', i. e. one day, and three days, and five days, and ten days, i. e. distinct stays were appointed for the quick or lawful distresses. '*Two notices were appointed for every distress*', i. e. two notices were fixed or established, i. e. a notice upon the debtor, and a notice upon the kinsman. '*Without exemption*', i. e. disease; for it is not served during an exemption, i. e. when the defendant has a disease. '*Without defect*', i. e. without 'irrad:' for if

he has either of these things, the notice shall not be served on him, (i. e. for if he has exemption it would be idle to serve the notice). '*A notice of five days to the defendant*', i. e. upon the debtor of the inferior grades, i. e. not to serve a shorter notice than five days upon a debtor of the inferior grades. '*A notice of ten days in the case of the inferior grade*', i. e. upon the tribesman who is a kinsman to one of the inferior grade. . . . . .

" '*Notice precedes every distress*', i. e. I deem it right that notice should be served on the inferior grades before distress be taken from them, and it is doubtful whether it is for a crime or a debt in this case. '*But no notice is served on a wanderer*', i. e. I make an exception here; no notice is served upon any wanderer who has not a fixed residence or place of abode, i. e. a notice of five days (i. e. longer than the notice which should have been given to the wanderer), is served upon the defendant, according to law, before the taking of distress from him, if it be right that notice should be given, i. e. to answer for the non-appearance of him (i. e. the wanderer). '*Or one who has no fixed residence*', i. e. whose residence is not known. . . . . .

"How is it carried off? How is it kept? How is notice given respecting it? How is it sought back with worthiness of the kinsman? Three carry it out to four persons . .

'*How is it carried off?*' i. e. how is it driven out? i. e. three drive it out to four persons. '*How is it kept?*' i. e. how is it brought out without fodder, without food? i. e. it is into a lawful pound it is brought. '*How is notice given respecting it?*' i. e. how is the notice brought? i. e. it is a notice by the track of the cattle, or a notice of the third word. '*How is it sought back?*' i. e. how is the 'urnaidh' of the distress of the kinsman brought? By worthiness.

" '*Three carry it out to four persons*', i. e. three persons carry it to the four persons who are outside, i. e. the four are awaiting it, and the three persons carry the distress out, i. e. a pledgeman (that is an advocate), a witness, a plaintiff. The four persons are, a witness, a plaintiff, a surety, and a hostage, i. e. who has honor-price, awaiting it at the pound of the plaintiff, i. e. the plaintiff is not obliged to have any one with him at the taking of the distress from a debtor, if he himself knows how to take it; and he may bring it to his own pound at once, whether the distress be great or small, and keep it there

during the period of delay in pound, and during the period of forfeiture, until it become all forfeited."

The Brehon books are full of passages composed apparently by the fraternity of speculative jurists to exercise their logical acumen. For example, in one Irish book—the book of Aicill[21]—there are four pages of hair-splitting rules about liability for injury to dogs in a dog-fight; two pages about damage done by a fool in an alehouse; forty pages on the law of bees. Oddest of all, we find five pages on liability for damage caused by shouting at a pig and making it run into a person, and herein many subtle distinctions between shouting done by a youth, by an adult, by an idler, and by a workingman, and shouting malicious, playful, necessary, and non-necessary; thus:[5]

[*Book of Aicill*, p. 243.] [Text] "The exemption of pigs at the trough or in the stye.

[Comment] "That is, should a person shout, the pig is exempt as regards injury to the idler who is behind the person who shouted, and beside the person who shouted and between the person who shouted and her [the pig], in case the person who shouted is himself an idler, since it is his shouting that incites her against all the other idlers; and there is half fine upon her owner for injuring the profitable worker, whilst the excitement caused by the shout is upon her, and when it has gone off her, there is half fine from her owner for injuring the idler, and full fine for injuring the profitable worker. .

"For the injuries from the malicious shouting of a sensible adult there shall be paid the full 'dire'-fine of the wound until death, whether profitable workers, idlers, or animals be injured, and full body-price after death for injuring persons, and full 'dire'-fine for injuring animals.

X. 21—The Book of Aicill

"For the injuries from the playful shouting of a sensible adult, there shall be paid half 'dire'-fine of the wound until death in the case of profitable workers and animals, six-sevenths of sick-maintenance until death for idlers, half body-price after death for persons, and half 'dire'-fine for animals.

"For the injuries from the shouting for unnecessary profit by a sensible adult, there shall be paid six-sevenths of sick-maintenance until death in the case of profitable workers, and six-sevenths of compensation after death; six-sevenths of sick-maintenance until death for idlers, and three-sevenths of compensation after death: four-fifths of sick-maintenance until death for a cow, and four-fifths of compensation after death; half sick-maintenance until death for a horse, and half compensation after death.

"For the injuries from the malicious shouting of a youth at the age of paying half 'dire'-fine, there shall be paid half 'dire'-fine . . . [etc., etc.]."

"For the injuries from the playful shouting of a youth at the age of paying half 'dire'-fine, there shall be paid . . . . [etc., etc.].

"For the injuries from the shouting for unnecessary profit, of a youth at the age of paying half 'dire'-fine, there shall be paid . . . [etc., etc.]

"For the injuries from the malicious shouting of a youth at the age of paying compensation, there shall be paid . . . . [etc., etc.]

"For injuries from the shouting for unnecessary profit of a youth at the age of paying compensation there is paid . . . . [etc., etc.]

"'Idle shouting' means the doing of it for the purpose of sport, and it is not sport with respect to the pigs; and if it were, it should be considered as idleness of foul play, and there would be full fine for it. 'Malicious shouting' means doing of it (the shouting) with a view to injury. 'Shouting for necessary profit' means shouting for the purpose of driving cattle out of fields of grass, or of cornfields, when they could not have been driven thence in a more lawful

X. 22—The Senchus Mor
The name is pronounced "Shankus Mawr".

manner; or, according to others, it means shouting before a plundering party. 'Shouting for unnecessary profit' means the doing of it (the shouting) in order to drive cattle out of fields of grass or cornfields, when it (the driving out) could have been done in a more lawful manner."

The alphabet of the Irish language was merely the Roman letters, as introduced by Pathric, with a few changes.[22] But the technical words of law were understood only by the professional Brehons; and the pages of the law manuscripts were written with a weird but studied irregularity which has never been practiced in any other civilized language. For example, if we take a sample passage, consisting of four lines of text in large letters and seventeen lines of commentary interlined in small letters, the order of the lines, in reading, is as follows:[22a] Imagine the lines in large script to be lettered A, B, C, D; and the small lines in between to be numbered 1, 2, 3, 4, from the top, down to 17; then they are read in the following order:

> The large script lines thus: B, A, C, D.
>
> The small script lines thus: 8, 7, 6, 5, then part of 4 and 3, then the rest of 4 and 3, then 2, 1, then 9, part of 12 and 11, then 12, 10, 13, 14, part of 16 and 17, then 15, and then the rest of 17!

How to read these books was the secret of the Brehons; and the living knowledge of this technical language dis-

X. 22*a*—The Senchus Mor: Sample Page, Enlarged

This enlargement shows the lines just below the middle of the left column in No. 22. The order of words and lines was artificial, and the secret was the possession of the Brehons

appeared with the last teacher of Irish law three centuries ago. Even the manuscripts themselves are now rare. And so few modern scholars can be found to master them that the task of deciphering and translating these few hundred pages of parchment, undertaken officially about 1852, occupied fifty years to finish.

12. The Welsh Code was not written down until about A. D. 900, some five hundred years later than St. Pathric's day in Ireland. King Howel the Good, after

whom the code is named, convened an assembly of all the chieftains, bishops, and jurists, to record the ancient customs. This Code of Howel the Good, or "Hyvreithu Huwel Dda", was then preserved in three copies. One was deposited at Dynevor in South Wales; one was kept at Howel's Castle of Aberfraw, on the island of Mona (or Anglesey); and one copy went about with the king himself. The manuscript most prized has been termed "Llyvr Teg", the Fair Book, from the excellence of the caligraphy.[23] Howel the Good dispensed justice in his great hall at Aberfraw, and so constant was his justice that his chief judge took the king's place at night, and there was never a moment when the suitor could not come for redress. Sketches of the judge and the king, made by the scribe, have been found on the oldest extant manuscript.[24]

This code was first written down long before Justinian's books were revived in Italy, and it seems purely Keltic, from beginning to end. And yet, one of the evidences of the subtle wide influence of the revived Roman law of the 1100's is that in some mysterious way (presumably at a later revision) the famous phrase of Justinian's opening chapter (which is found also borrowed in Bracton and in early Slavic books) is here found embedded, word for word, in the Welsh language, in the

X. 23—Welsh Laws of Howel the Good
Called "The Fair Book", because of its clear script

X. 24—The Judge and the King
The oldest manuscript is embellished with these drawings from life

middle of Book XIV (c. XX, par. 23), "Three things the law enjoins upon all: to live honestly; to cause no vexation or harm to another; and to render to every one his due."

The marked literary peculiarity of the Welsh Code is that almost every rule is fancifully forced into a "triad", as it is called. Thus:[h]

"Three things are not to be redressed: a thought, a frown, and an intent without an act.

"Three things are to be confined: a man, for an act which merits it; a beast, for damaging corn or hay; and a bird, when proper.

"Three things a chief is to listen to: a just claim, a just defence, and a just petition.

"Three things which neither a lord, nor a judge, is to listen to: a claim contrary to law; a claim which the law has previously investigated; and a claim in respect to which there has been previously a compromise between the plaintiff and the defendant.

"There are three discharges of recognizance in a cause: a counter-swearing; a vendor's warranty; and idiotcy: since there is no obligation then to answer.

"Three cases wherein denial and confession are of the same effect: where a verdict shall fail, in respect to a claim that is preferred; where guardians shall fail, in respect to a claim of theft; and the third case is proof.

"XXI. [of Voucher.] Three matters which need to be particularly named: a vouchee; a guardian; and a witness. . . .

"Three vouchees which comprize neither denial nor confession: a vouchee of law, or justice, that the claim is not to be answered, and declaring the cause; a vouchee of proved privilege, so that a defendant shall not be bound to answer; and a vouchee of lack of privilege on the claimant's part, so that he ought not to be answered, or of his being exceptionable by law.

"Three cases where a claimant and a defendant assign their vouchee to the same mouth: one, in the mouth of an acknowledged surety; the second is, in the mouth of a judge, as to how the judgment was pronounced; third, in the mouth of a lord, of there having previously been an adjudication as to the cause which is under discussion.

"Three cases where a person places himself as a vouchee: one is, to swear to his property, and to preserve his ownership of his own; the second is, a defendant proving birth and rearing of an animal by himself; the third is, proving custody before the loss of his property, and that it went not from his vouchee. . . .

"Three things are necessary to be lawfully made, before any one shall be adjudged as losing, or gaining, in the presence of an upright judge: a complaint; a summons; and a demand. . . .

"Three things which liberate a defendant from a claim: a judgment; a lawfully established vouchee; and a verdict. . . .

"XXII. [of Bonds.] There are three bonds: a suretyship; a contract; and an oath: hire and exchange are appropriately proceeded for by one of these ways. . . .

"Three kinds of bonds which one person enters into with another: a mutual bond, and that is a complete bond; an incomplete bond; and a futile bond.

"There are three lawful mutual bonds: suretyship; contract; and an oath. . . .

"XXIII. [of Oaths.] There are three kinds of lawful oaths: a complete oath; a loose oath; and a futile oath.

"There are three kinds of complete oaths in law: swearing to truth through and through; the second is, denying falsehood through and through; thirdly, doubt: a perfect oath means complete swearing."

13. These Keltic Codes, or at least the early Irish ones, were purely Keltic, and are therefore priceless for the study of comparative law. But they were influenced by one foreign element, viz., the new Gospel of Christianity. This influence is clearly seen in the very opening chapter of the Senchus Mor, the code said to have been compiled at St. Pathric's demand. For it tells how Pathric found the blood-feud in vogue, by which every killing led to a family or clan vendetta, but the wrong could always be settled by payment of a fixed sum, called "eric", like the Saxon "wergeld". Now Pathric, in the name of Christianity, insisted that the murderer should

be solemnly condemned as a criminal and not be either copied by retaliation in kind or let off with a payment of money. And so in the opening chapter it is recorded, "There shall be no vengeance by the family, but each man for his crime shall suffer the death of a criminal"; and the ancient custom was abolished of "cos i cois, ocus suil a suil, ocus ainm i-naimn", "a foot for a foot, an eye for an eye, and a life for a life".

But alas! Pathric's reform never took solid root, neither then nor for a thousand years. The deep-seated Keltic racial idea was that a homicide is a family or clan affair, and may be either avenged by retaliation or settled by payment, but that it is emphatically *not* a matter for state interference in the interest of law and order. (This sentiment survives yet in the Keltic stock of the mountains of southeastern United States.) And when the English took possession of Ireland, long after, nothing shocked their sober sense of law and order more deeply than this Keltic practice of buying off a homicide. Edmund Spenser, in his discourse on "the Present State of Ireland" (A. D. 1596), thus recorded the English view:[1]

"Eudoxus. What is that which you call the Brehon law? it is a word unto us altogether unknown.

"Irenius. It is a certain rule of right, unwritten, but delivered by tradition from one to another, in which oftentimes there appeareth great shew of equity, in determining the right between party

and party, but in many things repugning quite from God's law and man, as for example, in the case of murder. The Brehon, that is their judge, will compound between the murderer and the friends of the party murdered, which prosecute the action, that the male-factor shall give unto them, or to the child or wife of him that is slain, a recompence, which they call an Iriach; by which vile law of theirs many murders are amongst them made up and smothered. And this judge being, as he is called, the Lord Brehon, adjudgeth for the most part a better share unto his Lord, that is the Lord of the soyle, or the head of that septe, and also unto himself, for his judgment, a greater portion than unto the plaintiffs or parties grieved.

"Eudoxus. That is a most wicked law indeed."

And a famous case, which occurred ten centuries after St. Pathric's day, exhibits that trait, and illustrates how hard it was for the two races to understand each other. This was the case of James Lynch (which by a complete twist of meaning has led in modern times to the term "lynch law"). In the early 1400's, Lynch was mayor and judge in Galway, in the north, where the English were in control. Lynch's hot-blooded son was jealous of the attentions paid to a certain maiden by a young Spanish visitor, a guest in his father's house.[25] The son foully killed the guest. Lynch the father held court upon his son, condemned him to death, solemnly took the last sacrament with him, and then, since none other could be found to do the act, he executed his son with his own hand in the market-place. Lynch the father went back into his

house, in stern grief, and never left it again in life. At that same period, Brehon judges were still permitting homicide to be compounded with money; and the Irish were deeply shocked at Lynch's type of stern penal justice.

(III) Third Period

The Dissolution of the Keltic System

These two branches of the Keltic system, after a gradual decline, perished within a century of each other. In both cases the end came by force of conquest.

14. The Welsh was the first to end. For two centuries after the Norman conquest of England the Welsh

X. 25—Judge Lynch's House at Galway

X. 26—Statue of Llewellyn the Great
Now in the square at Conway

had held out in their mountains and valleys of the west coast. In the late 1100's, came Llewellyn the Great, the best ruling mind that had ever arisen in Wales; he is still their national hero.[26] He made a last effort to unite the Keltic tribal factions of his people, by establishing a national council, which he summoned at Aberdovey, in one of the picturesque valleys of the coast. In almost the same year, John of England was calling a great council at Oxford, which later did become a national English parliament of laws. But Llewellyn's council met the opposite destiny. It did not survive his own life.

Once later, indeed, in the 1400's, Owen Glendower (the Welsh hero whose picturesque character has been enshrined by Shakespeare) did make a final similar effort by summoning at Machynlleth the last Welsh semblance of a parliament; and the house of his parliament is still pointed out.[27] But his power was broken by Henry Hotspur, and this last effort failed.

In the meantime, however, in 1215, had come Magna Carta to save for a while the ancient laws of Wales; for

X. 27—Owen Glendower's Parliament House

Llewellyn the Great had joined the English barons in their successful struggle against King John, and, as his reward, chapter fifty-six of Magna Carta[28] provided that Llewellyn's son, who had been held by John as a hostage, should be given back, and that disputes over land held in Wales should be decided by the law of Wales:

"[As to the lands and liberties of Welshmen] if a dispute arise over this, let it be decided in the Marches [borders] by the judgment of their peers, for tenements in England according to the laws of England and for tenements in Wales according to the law of Wales."

And so for a while Welsh law was preserved for Wales. But by seventy years later a far different king from the

X. 28—Magna Carta, Chapter 56
In this chapter the law of Wales was preserved "for tenements in Wales"

weak King John had resumed the task of subduing Wales. Edward I, the great organizer, was building around Wales a ring of powerful castles, whence he could muster his armed forces. In the year 1284, after crushing the power of Llewellyn the Great's grandson (another Llewellyn, and an equally courageous Welsh leader), Edward I called an English parliament at one of these great castles, Rhuddlan;[28] and there was enacted the statute of Rhuddlan, 12 Edward I, which made Wales an appanage of the English crown, and forever ended the political independence of the Welsh. And in that same year, at Carnarvon

X. 29—Rhuddlan Castle

in Wales, where soon was to arise Edward's greatest castle of defence, was born the king's son Edward, who was now given the new English title of Prince of Wales, to emphasize the new political status of Wales. Edward I, as tradition has it, had placated the Welsh people by promising them that he would give them a native prince, one who could speak no other tongue than their own; and this promise he fulfilled to the letter, but to the letter only, by displaying to them this speechless babe of his, born on Welsh territory.

But the statute of Rhuddlan, though it annexed Wales to England, did indeed leave to the Welsh for a while their ancient laws; for the preamble declares that Edward, having caused "the laws and customs hitherto used to be recited before us and our nobles, some of the laws we have allowed to remain, some we have amended, and some others we have decreed to be added thereto". And nearly three more centuries of border strife and gradual amalgamation were to elapse before the Welsh lost even those remnants of Keltic law.

Its final extinction was the work of the Tudor dynasty. In 1535 the statute of 26 Henry VIII, chapter 25, uniting Wales completely to England, declared that "in order to extirp all and singular the sinister usages and customs of

Wales", hereafter "the laws, ordinances, and customs of this realm of England, forever, and none other laws, ordinances ne statutes, shall be had, used, practised, and executed in the said country or dominion of Wales and every part thereof."

15. The same century, the 1500's, that witnessed the formal extinction of the Keltic legal system in Wales saw the like struggle drawing to a close in Ireland.

Under Henry II and John, some Norman-English law had been brought over to Ireland by the invaders. Henry III, in A. D. 1221, commissioning his first judges for Ireland, thus referred to that earlier event: "Our father, John, took with him to Ireland discreet men skilled in the law, and ordained that the laws of England should be observed in Ireland". But this was not yet to be, except in the limited area (the Pale) on the east coast, occupied by the English royal deputies.

Under Henry VIII and Elizabeth the physical conquest and colonization of Ireland proceeded apace. But its law remained, in name at least, till the next century. Finally, in 1613, James I called an Irish parliament, and this body went through the form of declaring the Brehon law abolished. English law was substituted, and an English

X. 30—The Four Courts, Dublin

court-house was later built—the Four Courts—in Dublin.[30]

Why did the Irish Keltic system thus perish? For two main reasons.

The first reason was external. The English conquerors of those days did not, would not, and could not preserve the native system, as the modern English could do and did do in India and elsewhere, and as the modern French have done in Islamic regions.

The second reason was internal. The Irish system was utterly behind the times, and had not been changed and adapted to suit the new times.

This task of adapting the law might have been achieved by either of two forces. It might have been done by the Brehons, the professional jurists, as the English judges and jurists were doing it for the common law, and as the Roman praetors had done it for Roman law. But the last known Brehon opinion is dated A. D. 1571, and it is even composed in Latin, not in Irish.[31] The Brehons failed in their destiny; just why, is matter for speculation. Together with the bards, to be sure, they were the constant voice of Irish patriotic tradition, and many of the fraternity were exterminated in the course of the fierce wars of conquest. But their juristic results are in striking contrast with those of the Jew-

X. 31—The Last Brehon Opinion

ish rabbi (*ante*, Chap. III), who amid similar circumstances of war and political defeat brought their customary law to its highest stage of development.

Or, secondly, the Brehon law might have been adapted to the new needs by a strong central executive, as was being done in Germany at that very period. But it was at this era Ireland's misfortune that it was denied (in Sir Henry Maine's words) "the great condition of modern legal ideas—a strong central government". For ten centuries (save a few brief moments about A. D. 1000, when Brian Boru saved Ireland from the Norsemen) there had been no effective chief king in Ireland. In the ninth century, for example, there were more than one hundred princes or chieftains,—all calling themselves "kings", each holding his own assembly and ruling his petty state, and from time to time one of them gaining a brief suzerainty over some of the others and then losing it again. This was in strong contrast with Keltic Scotland's history, where from the 500's onward there was but one kingdom of the Scots, and this one kingdom gradually dominated the whole country.

The last king who sat at Tara was Dermot, about A. D. 550, and his downfall was characteristic of the Keltic weakness. Dermot had been striving to give unity to the Keltic tribes, and to establish the stern justice of an

X. 32—The Cursing of Tara

orderly state. In this effort he had sought firmly to punish a certain influential murderer, had pursued him to one of the churches where he had taken sanctuary, haled him forth, tried him at Tara, and condemned him. But Bishop Ruadan, offended at this defiance of the church's sanctuary rights, had resolved to break the power of King Dermot forever. He assembled the clergy, proceeded to Tara, excommunicated Dermot, and there pronounced a solemn curse upon Tara,[32] upon the king and his kingdom. "Desolate be Tara, forever and ever!" was his curse; and it fell upon the Keltic mind with all the terrible force which the Druid curse had carried. King Dermot yielded to the bishop, and gave back the murderer.

X. 33—The Harp of Tara

Ireland never again knew a unified kingly executive of its own. The curse remained on Tara. "The last feast of Tara", says the chronicle, "was made by Dermot".[k] The annual national festival of all the clans, which had for five centuries been celebrated in the mighty banquet hall, amidst the sonorous recitals of the bards,[33] was held no more. "The Harp that

once through Tara's halls The soul of music shed Now hung as mute on Tara's walls As if that soul had fled. So sleeps the pride of former days. So glory's thrill is o'er". The annual assembly of chieftains, which had listened in the forum of Tara to the Brehons pronouncing their judgments, and which might have developed into a genuine parliament, now ceased to meet. In the ensuing centuries, the repeated invasions of the Danes and the Normans effectually prevented any resurrection of Ireland's incipient unity. Tara, in the days of Henry VIII, when Brehon law might have made a sturdy stand for its life, had long been a desolate ruin, where scarcely one stone stood upon another.[34]

X. 34—The Ruins of Tara

16. But all the sentiment of the Irish people for its ancient political and legal glories still clustered round this spot. And it was indeed once more, momentarily, to

become a national meeting-place. This was in 1843. The English conquest had given Ireland a nominally national parliament, which with a shadow of legal independence had continued until 1799; in that year it had voted to extinguish itself, and to make a union with the English parliament. But in 1840 Daniel O'Connell,[35] the greatest Keltic political orator and leader since Vercingetorix, organized a movement for the repeal of this legislative union. And it was at the ancient hill of Tara that O'Connell, as a part of his propaganda, called a great mass-meeting of Irishmen on August 15, 1843. It was reported by the London Times that one million persons thronged to this monster assembly; most of them must have trudged on foot from every corner of the land; it was probably the largest single political meeting in the world's history. But it was the last strong throb of Ireland's political heart. The repeal movement

X. 35—O'Connell's Statue at Dublin

X. 36—Daniel O'Connell
This rare portrait gives an idea of the physical power which fortified his eloquence

failed. Daniel O'Connell passed away,[36] and the Irish

SAORSTÁT EIREANN.

Uimhir 10 *de* 1924.

ACHT CUIRTEANNA BREITHIUNAIS, 1924.

[*An leagan Gaedhilge do hullamhuiodh go hoifigiúil.*]

ACHT CHUN CUIRTEANNA BREITHIUNAIS DO BHUNU DO REIR BUNREACHT SHAORSTAIT EIREANN AGUS CHUN CRICHEANNA A BHAINEAS LE FEABHASU RIARA CIRT. [12*adh Aibrin*, 1924.]

DE BHRI go bhfuil sé riachtanach chun comhacht bhreithiúnais Shaorstáit Eireann d'fheidhmiú agus chun ceart do riara i Saorstát Eireann, cúirteanna puiblí do bhunú do réir na bhforálacha atá sa Bhunreacht chuige sin:

ACHTUIGHEADH OIREACHTAS SHAORSTAIT EIREANN AR AN ABHAR SAN MAR LEANAS:—

Roimh-fhocal.

1.—Féadfar chun gach críche an tAcht Cúirteanna Breithiúnais, 1924, do ghairm den Acht so.

X. 37—The Irish Act of April 12, 1924
This is the first page of the Act. The words at the top mean "Irish Free State"

did not regain their legal independence for another eighty years.

17. A modern Keltic author, commenting on racial

X. 38—The Chief Justice, Hugh Kennedy

traits, has spoken of "the Keltic luxury of scheming against the inevitable". The Irish continued to indulge in this luxury. And the dream did come true at last.

The Supreme Court of Judicature of the Irish Free State was established by the Irish Act of April 12, 1924.[37] The first Chief Justice of the court was Hugh Kennedy.[38] This court (to quote the inaugural speech of the Chief Justice) "will administer justice according to laws made in Ireland by free Irish citizens for the well-being of our dearly loved land and its people, enshrining the ancient inspiration and invoking again the dormant reverence for a judgment"; that is, in Irish, "breith". And on June 11, 1924, a solemn procession was seen marching through the streets of Dublin to the Castle to open the first session of the court.[39]

The name of the court in the Act is "Ard-Chuirt" or Chief Court; the word used for "judgment" in the act is

X. 39—Procession to Open the Supreme Court, 1924

"breith", and the name for "judge" is "breitheamh" (pronounced "brehiv"), the old Keltic words exactly. In language, it is a Keltic court. But by a curious irony the very first writ issued from this court in the ancient Keltic language was an action for damage caused by negligent driving of a twentieth-century motor-car!

And, after all, the law which this court administers will never be the ancient Keltic Brehon law. Sure, that is gone forever,—Ta a chnaipe déanta anois sheachas ariam.

Sources of Illustrations

1. *Map of Europe Showing Literate Regions A. D. 50.* Prepared by the author.
2. *Vercingetorix Surrenders to Caesar.* From the illustration by *A. de Neuville*, in F. P. G. Guizot, "History of France", vol. I, p. 66 (Boston, Estes & Lauriat, 1882).
3. *Statue of Vercingetorix.* From a view by *E. Clerc-Darcy*, librairie photographe, Sémur, of the monumental statue by *J. B. Millet*, at Alise-Ste-Reine (the Roman Alesia).
4. *Map of Keltic Race Settlements.* Prepared by the author.
5. *A Mountain Kelt of Scotland.* From a reproduction of the painting by *Joseph Simpson*, R. S. A., owned and licensed for copy by John Dewar and Sons, Ltd., Distillers, Perth (Scotland) and London.
6. *Stonehenge.* From an old print reproduced in a pamphlet by *Moses Colsworth*, on the calendars of all peoples.
7. *The Plain of Carnac.* From a photograph by *E. Hamonic*, Brittany.
8. *An Eisteddfod Assembly in Wales.* From a photograph furnished by *J. Ballinger*, Librarian of the National Library of Wales, 1926.
9. *A Druid Pronouncing Judgment.* From an illustration by *Wm. Rainey*, in *Mary McGregor*, "Story of France", p. 4 (Edinburgh, Nelson, New York, Stokes, 1920).
10. *Druids Offering a Human Sacrifice.* From the illustration by *A. de Neuville* in *Guizot*, "History of France", vol. I, p. 111 (Boston, Estes & Lauriat, 1882).
11. *Forum and Basilica at Silchester, A. D. 200.* From a drawing by *A. Forestier*, archaeologist, as reproduced in the "Illustrated London News", Sept. 19, 1925; representing the results of recent discoveries.
12. *A Keltic Fighter.* From the Roman sculpture reproduced in *O'Curry* (cited *infra*), I. cxcviii.
13. *Map Showing Tara.* From the map in *Lawless* (cited *infra*).
14. *Ground-Plan of Tara.* From the reconstruction by *George Petrie*, "History and Antiquities of Tara Hill" (Transactions of the Royal Irish Academy, 1839, vol. 18; as reproduced in *P. W. Joyce*, "Social History of Ancient Ireland", vol. II, p. 80, London, Longmans, 2d ed. 1913).
15. *The Book of McDurnan.* From the facsimile by *Westwood*, as reproduced in Joyce, vol. I, p. 547 (cited *supra*).

15a. *The Wrong Judgments of Caratnia.* From the facsimile reproduction in "Rawlinson MS. B. 502", page 113, in the Bodleian Library, ed. *Kuno Meyer* (Clarendon Press, 1909).

16. *Pathric Causing the Irish Customs to be Written Down.* From the illustration in *T. W. Rolleston*, "Myths and Legends, the Celtic Race," p. 278 (London, Harrap, New York, Crowell, 1912).
17. *Statue of St. Pathric on Tara Hill.* From a photograph by *Ewing Galloway* (New York, 1926).
18. *St. Columba Winning the Kells.* From the illustration in *Henrietta E. Marshall*, "Scotland's Story", p. 16 (London, Nelson, New York, Stokes, 1907).
19. *The Book of Kells.* From the facsimile edition by Sir *Edward Sullivan* (London, 1914, The Studio, New York, A. & C. Boni), in the possession of the Chicago Art Institute.
20. *Irish and Saxon Law Script, Compared.* From facsimile pages in *Thorpe's* "Ancient Laws of England" and the Senchus Mor facsimile, *infra*.
21. *The Book of Aicill.* From the facsimile of Trinity College MS. Collection, E. 3, 5, as reproduced in "Ancient Laws, etc.," vol. III, frontispiece (cited *infra*).
22. *The Senchus Mor.* From the facsimile of the British Museum Harleian MS., No. 432, as reproduced in "Ancient Laws and Institutes of Ireland", vol. II, frontispiece, plate I (London and Dublin, published for the Government Commissioners, 1865), and the same passage, enlarged, in Joyce, I, 176 (cited *supra*).
23. *Welsh Laws of Howel the Good.* From a photograph of the original MS. (Peniarth MS. 32, Hengwrt MSS. 311 and 8) of page 1 of the Venedotian Code, in the National Library of Wales, Aberystwyth (furnished in 1926 by the Librarian, *J. Ballinger*, M. A.).
24. *The Judge and the King.* From the Peniarth MS. 28, Hengwrt MS. 7, as reproduced in *Aneurin Owen*, "Ancient Laws and Institutes of Wales", vol. II, pp. 751, 758 (London, 1841).
25. *Judge Lynch's House at Galway.* From the illustration in *M. M. Shoemaker*, "Wanderings in Ireland", p. 4 (New York, Putnam, 1908). A striking instance of a reverse contrast between English and clan ideas of justice may be seen in the anecdote of the Shammari's execution of his own son, in modern Arabia: *Fulanain*, "The Marsh Arab," p. 60 (Phila. 1928).

26. *Statue of Llewellyn.* From a photograph of the original in Conway, procured for the author by *W. F. Mansell* (London, 1924).

27. *Owen Glendower's Parliament House.* From the illustration in *George Borrow*, "Wild Wales", p. 312 (New York, Putnam, 1900).

28. *Magna Carta, cap. 56.* From a lithograph facsimile of one of the MS. (Washington, D. C., *M. Walker Dunne*, n. d.).

29. *Rhuddlan Castle.* From the illustration in *O. M. Edwards*, "Story of Wales", p. 197 (New York, Putnam, 1901).

30. *The Four Courts, Dublin.* From the illustration in *Emily Lawless*, "Story of Ireland", p. 369, drawn by *R. Harvey*, engraved by *M. A. Williams* (New York, Putnam, 1891).

31. *The Last Brehon Opinion.* From the facsimile in Sir *J. T. Gilbert*, "Facsimiles of National MSS. of Ireland", part IV, div. 1, plate XVI (London, H. M. Stationery Office, 1882).

32. *The Cursing of Tara.* From the illustration in *Rolleston*, p. 48 (cited *supra*).

33. *The Harp of Tara.* From the drawing by *Robert Hope* in *Thomas Nelson & Sons'* edition of Sir Walter Scott's "The Betrothed", p. 16 (Edinburgh, 1901).

34. *The Ruins of Tara.* From the illustration by *W. F. Wakeman*, in *Mr. & Mrs. S. C. Hall*, "Ireland, Its Scenery and Character", vol. II, p. 386 (New York reprint, Lovering, n. d.).

35. *Daniel O'Connell.* From a lithograph (undated), drawn by *Edouard D'Arsey* and printed by d'Aubert, from a daguerrotype by *Poussin-Dubreuil*, at Dublin.

36. *O'Connell's Statue at Dublin.* From a photograph in *Charles Johnston*, "Ireland Historic and Picturesque", p. 372 (Philadelphia, Coates, 1900).

37. *Irish Act of April 12, 1924.* From a copy furnished in 1925 to the author by the late Hon. *Kevin O'Higgins*, Minister for Justice (assassinated in 1927).

38. *Chief Justice Kennedy.* From a photograph furnished by Hon. *Kevin O'Higgins.*

39. *Procession to the Court, 1924.* From the only photograph taken, furnished by Hon. *Kevin O'Higgins.*

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a. Caesar's Commentaries on the Gallic War, book VI, par. 13.

b. Finn v. Goll. Told in *J. Stephens*, "Irish Fairy Tales", p. 166 (1920). The case was adjudged presumably on the same principle that still obtains for inter-clan killings with some Arab tribes; the side whose losses exceed the other's is the one to receive compensation for the excess loss: *Fulanain*, "The Marsh Arab", p. 70 (Phila. 1928).

c. St. Columba's Defence. As quoted in *O'Clery*, "Annals of the Four Masters", ed. O'Donovan, vol. I, p. 192, A. D. 555 (Dublin, 7 vols. 1851).

d. Judgments of Caratnia. Translated from the German translation of Professor *R. Thurneysen*, Bonn University, in his edition, with glosses, of the text, "Aus dem Irischen Recht: III, Die falschen Urteils-spruche Caratnias" (Zeitschrift für celtische Philologie, 1925, XV, 302); the translation has had to be somewhat expanded from the elliptical original, in order to make clear the distinctions intended.
No graphic representation of a Brehon costume appears ever to have been transmitted; none could be discovered for the author by the following learned bibliologists: Eleanor Lewis, Reference Librarian in Northwestern University; Walter M. Smith, Librarian of the University of Wisconsin (Irish Collection); the Librarian of Trinity College, Dublin; G. Fitzgerald, Assistant Librarian of the Royal Irish Academy, Dublin; L. S. Gogan, Assistant Keeper of Irish Antiquities, National Museum, Dublin; to the last of whom special thanks are due for his exhaustive search.

e. This is the view plausibly advanced by *Bertrand*, "La religion des Gaulois: les Druides et le Druidisme" (1897), though it has not been met with in other authors. It is certainly the one fact which adequately explains the sudden appearance in writing of a full-fledged system of Keltic law about A. D. 500-800,—a phenomenon otherwise unparalleled and incomprehensible.—
Since noting the above, the author finds that substantially the same view is taken by Professor *John MacNeill*, the eminent Irish historian ("Celtic Ireland", 1921, p. 24), who is striving to define the solid territory of historic fact hitherto obscured by the golden magic mist of Irish legend.
Another modern Keltic scholar goes even farther and maintains the continuity of the Druidic priesthood from megalithic pre-Keltic times: "The Druids were the priests of the pre-Celtic (megalithic) aborigines of the British islands, and it is from them only that the Celts received them" (*Julius Pokorny*, in the Celtic Review, V, 17, July 15, 1908, and the Report of the Smithsonian Institution for 1910, p. 583).

f. Passage from the Senchus Mor, in "Ancient Laws and Institutes of Ireland", vol. I, p. 256.

g. Passage from the Book of Aicill, ibid., vol. III, p. 243.

h. Passage from the Laws of Howel the Good, in "Ancient Laws and Institutes of Wales", vol. II, p. 648, ed. *Owen* (London, 2 vols. 1841).

i. Brehon Custom of Compounding a Homicide. From *Edmund Spenser*, "A View of the Present State of Ireland" (Complete Works, Grosart ed., vol. IX, p. 122, London, 1882).

j. Magna Carta, cap. 56. From the text in *Wm. S. McKechnie*, "Magna Carta" (Glasgow, 2d ed. 1914).

k. Cursing of Tara. It must be added that the story of Tara's cursing and forthright desolation, which most modern writers on Irish history have accepted for fact, is now disbelieved by Professor MacNeill, who gives plausible reasons ("Phases of Irish History", 1920, p. 234). And yet, even as a long accepted legend, it seems to symbolize correctly enough some features of history.

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THE
SLAVIC
LEGAL SYSTEM

XI

The Slavic Legal System

1. Four main branches of the Slavic race.

(*I*) *Bohemia*

2. The Checks—Judgment of Libussa, the maiden ruler.
3. Germanic mercantile towns—Brünn Book of Rights—Court record of Brünn.
4. The Jus Regale Montanorum—Charles IV and his imported Romanesque jurists—Majestas Carolina.
5. Budovec, the patriot chief justice—The Defenestration—Suppression of Bohemian law.

(*II*) *Poland*

6. Kasimir the Great's Charter of Wislica—Romanesque law—Court record of Krakow—Germanic mercantile law.
7. Constitution of Nieszawa—Poland an oligarchy—The Liberum Veto—Konarski the jurist.
8. Partition of Poland—Code Napoleon and Russian law.

(*III*) *Yugoslavia*

9. Greek Christianity—Shepherds and mountaineers.
10. Romanesque law from Byzantium and Venice—Law-code of Spalato—Glagolite script and the law-code of Verbenik—Serbian code of Stefan Dushan.
11. Mohammedan and Austrian law in the Balkans.

(*IV*) *Russia*

12. Four periods in Russian legal history.
13. Early Germanic rulers—Greek church law from Byzantium—Code of Yaroslav the Just.
14. Centralized feudalism—Ivan the Terrible and his bloodthirsty rule.
15. Trial Methods in the 1500's.
16. Tsar Alexis and Chancellor Nashchokin—Bureaucracy—Peter the Great—Futile code-commissions—Catherine's code plans.
17. Emperor Nicholas I and Chancellor Speransky—The Svod Zakonof code—Reforms of judiciary organization.
18. Revolution of 1917—Soviet codes and justice.

XI. 1—Map of Slavic Regions

XI

The Slavic Legal System

THE Slavic race has contributed to the world's human nature some of the most admirable and distinctive traits,—especially an unquenchable idealism. But no native, pure, and distinctive Slavic legal system ever came to pass. This was due partly to the racial tendency to egocentric unpractical dissension over ideals, which left the Slav people politically weak; partly to the invasions of other forceful races; and partly to the close proximity of more advanced legal systems.

The settlements of the Slavic race covered nearly two-thirds of Europe;[1] their westernmost edge ran originally on a line drawn south somewhere between the modern Berlin and Venice. But, of the twelve or fifteen Slavic race-branches, almost all have been overlaid or penetrated and diluted by alien peoples coming from the north, the west, and the south.

The four principal Slav branches that stand out most individually and compactly in legal history are the Bohemian, the Polish, the Serbian, and the Russian; and we shall sketch their legal history in this sequence.

(I) BOHEMIA

2. The original home of the Slavic race seems to have been in the dreary marsh-lands of Galicia. But the Bohemians and the Poles wandered thence west and north, while the Russ and the Serbs spread east and south.

Now, although no written code of purely Slavic legal ideas exists, or probably ever did exist, nevertheless, the earliest recorded legend of the Slavic people is the story of a lawsuit, in the Check tribe in Bohemia, upon their settlement at Prag. A medieval sketch shows the early castle of St. Vaclav at Praha (in German, Prag); on the right stands Chech, leader of the earliest Bohemian settlement, whose name the people now bear; on the left is Lech, his cousin, leader of the immigrant Poles, who

XI. 2—HRADCHANY CASTLE, IN PRAHA

wandered further north. About A. D. 600 the original castle was built; but on its very site today stands the superb Hradchany Castle.[2] This castle, enormous in area, and commanding in its position, has through the centuries been the central scene of Bohemian political and legal history. The early Slav legend of a lawsuit is located on this spot; the event is called The Judgment of Libussa. The medieval manuscript chronicling this legend in verse came to light only in the late 1800's, and is now preserved in the National Bohemian Museum at Praha.[3]

XI. 3—THE JUDGMENT OF LIBUSSA (MS.)

Libussa was a virgin leader of the Checks. They then had no king, but lived in free tribal democracy, like the Greeks, each family holding its property in common. Their only common government was an elected judge, and at this period the judge was a woman,—the beautiful maiden Libussa. It came to pass that two brothers in the

community, on their father's death, quarreled over the inheritance. Libussa summoned them before her as judge, and in the presence of the assembled people she pronounced that the two brothers should divide the property equally; for this had been the custom.[4] Yet she then left it to the assembly to approve or disapprove her judgment. Whereupon the elder of the brothers (says the chronicler), rose boiling and trembling with rage, shook his fist, and roared like a bull:[a] "It is a cursed judgment. The inheritance should go to the older son—to me, and not be equally divided. We have had enough of a woman judge. And I call upon you to depose this woman, and let men be ruled by a man." On which Libussa replied: "You hear his insult. I will no longer judge over you. Choose now a man, for king, who will rule you with a rod of iron." And so they installed a king.

The story is significant for us, because it illustrates the first great reason which has ever since hampered the political and legal development of the Slavic race,—its restive tendency to disunion and secession, except when ruled by a despot.

3. The second element obstructing native Slav development has been the intrusions of an alien race and law,—in this case, Germanic. Brünn was one of the chief mercantile towns in this region, and German merchants

XI. 4—The Judgment of Libussa

XI. 6—Brünn Book of Rights, A. D. 1243

This was the book of Germanic law for the Germanic merchants who populated the town of Brünn. It begins, in old German: "Hie hebt sich an das 1 buch von lantrecht und von lehenrecht in dem namen der wirdikeit gottes"

dominated it.[a] All the chief towns of Bohemia were composed mainly of Germanic immigrants,—merchants, who lived by Germanic law, usually that of Magdeburg in Saxony; and the town laws of these semi-Germanic cities became a chief source of mercantile law.

XI. 5—Town Hall at Brünn

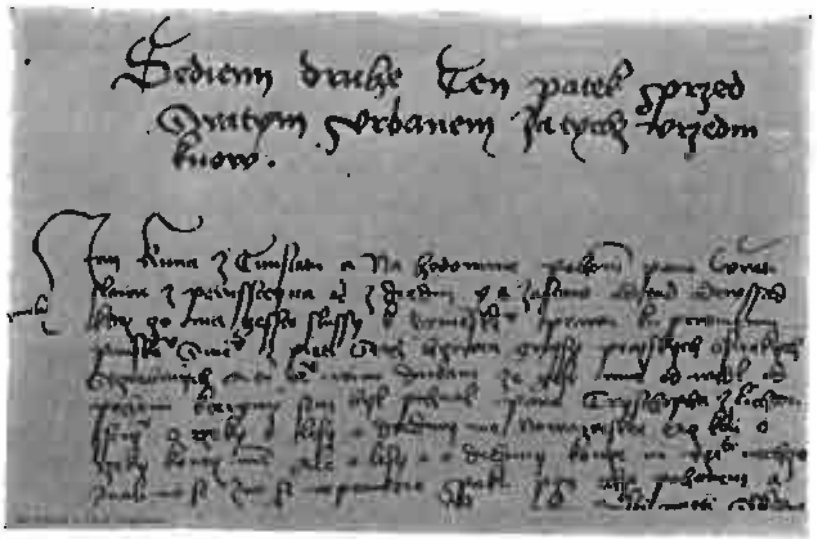
The Brünn Book of Rights, of A. D. 1243,[a] was the most notable of these town codes. The manuscript still preserved at Brünn is one of the finest among medieval law-books. The law itself is crude enough; in §9, for example, it is provided that he who cannot pay damages for a mayhem must suffer "an eye for an eye, a hand for a hand, and so on for other members of the body".[b]

The court records of Bohemia are more abundant than in any other Slavic country; but at this time, and for three centuries later, they are meagre and crude,—in marked contrast to the English year-books of the same period. Here is one from Brünn; though as late as 1495, it contains merely a minute of the plaintiff's claim, and some-

times a brief judgment, but no opinion nor argument nor citation of authorities.[7] It reads:[c]

"*Second Session, Friday before St. Urban's Day.* I John Kuna of Kunstat and Hodonin make claim against Mr. Vratislav of Pernstein, free-holder, for 500 marks of broad silver groschen, coinage of Prag, and do allege that he had obstructed me in the suit which I brought against Mr. Kristofer of Lichtenstein for certain river, forest, and homestead land at Nove Ves; for though he has settled with me for the river land, he refuses to settle for the forest and homestead land. If he admits my claim, I ask judgment. If he disputes it, I will prove the contract and damages.

"Power of attorney given to my brother, Mr. Bocka, for winning or losing the suit". [Memo. of Clerk] "Deft. died".



XI. 7—Court Record at Brünn, A. D. 1495
The heading reads: "Sediem druhe ten patek przed Svatym Urbanem za tychz urzednikov"

4. Bohemia in this period produced a number of native law-treatises of the type of our English Littleton; and these writers, in the 1400's, might have developed an enduring Slavic type of law. Meantime, however, was operating still a third alien influence,—the resurrected Roman law from Italy. In A. D. 1300 was in vogue the elaborate code of the mining region at Kutnahora, the Jus Regale Montanorum, in several hundred sections.[8] A doctor of the civil and canon law had been imported from Italy to draft this code. It is written in Latin (not in Slavic), and is divided into books, entitled Persons, Things, Actions, like the Roman Gaius; and in the very

XI. 8—The Jus Regale Montanorum

opening paragraph we detect the celebrated passage, copied from the first chapter of Justinian's Digest, enjoining the people "honeste vivere, alterum non laedere, jus suum unicuique tribuere".

Meantime, in this same century, comes on the scene Charles IV, Emperor of Germany and King of Bohemia, and one of Bohemia's great national heroes. He set himself to weld together these conflicting elements,—the native Slavs, the mercantile Germans, the Romanesque law learning, and the religious factions. He made Prag

XI. 9—Charles IV Founding the University of Prag

for centuries the intellectual centre of the Germanic countries. He founded the University of Prag, in A. D. 1348,[9] the first university in any German or Slavic region, and there he instituted the teaching of Roman and canon law. His ambition was to become the great lawgiver for Bohemia. And he imported the celebrated Bartolus, Italy's most famous jurist of the day (*post*, Chap. XV) to help draft a complete national code.

This code, known as the Majestas Carolina, in one hundred and eight sections, was duly promulgated, A. D. 1346.[10] But the Bohemian nobles in Parliament, with the fatal Slav tendency to disunion, refused to ratify it; for it diminished their power and improved the condition of their peasants. And so, nine years later, Charles was forced to recant and to declare his code null and void; oddly enough, he sought to cover his chagrin by the false recital in his decree that the only copy of the code had been

XI. 10—The Code of Charles IV, Majestas Carolina

destroyed by fire before it reached the Parliament.

5. The efforts of the great Charles to weld together the conflicting elements, Germanic and Slavic, failed utterly; and for three centuries more Bohemia continued to be convulsed by the conflict, religious and racial, Catholic and Protestant, Germanic and Slav, typified in the Protestant rebellion of John Hus.

This conflict came to an end with the execution of the Check patriot and orator, Budovec, chief justice of the Supreme Court.[11] Budovec had headed a movement against the German faction under Slavata, who was a rival chief justice by appointment of the German Emperor Ferdinand I at Vienna. The Check leaders, at a solemn final meeting with the German faction, in the Council Room of the Hradchany Castle, on March 3, 1618, ended by casting out of the windows bodily the rival chief justice Slavata and his associates; this being

XI. 11—Budovec, Chief Justice of Bohemia
He was executed in the market-place, A. D. 1621

XI. 12—The Market-Place at Prag
Here the Bohemian patriots were executed, A. D. 1621

the traditional form of punishment for traitors in Bohemia. This act of "defenestration", as it is called, stands out in Bohemian patriotic history as Bunker Hill does in American history. But the issue was far otherwise. For three years later, at the Battle of the White Hill, near Prag, the Emperor Ferdinand totally defeated the Bohemian forces. Budovec and a score of Check leaders were executed in the market-place of Prag before the old town hall, on June 21, 1621.[12] It was a popular saying that "the last Bohemian fell at the battle of the White Hill". More than half the population was now exiled; three-quarters of the landed estates were confiscated. After 1621, Bohemia's independent political existence ceased. Under the Hapsburg dynasty the Check legal system was gradually and completely Germanized.

Czechoslovakia is now once more politically independent, and has re-cast its legal codes. But its legal system is not and never can be distinctively Slavic.

(II) Poland

6. It is an odd coincidence that in all four principal Slavic branches, in spite of their very different histories, the century of the 1300's was the first period of national law-giving. Charles IV in Bohemia in A. D. 1346 had promulgated his Majestas Carolina; and in A. D. 1347 Kasimir III of Poland, called Kasimir the Great,[13] promulgated his Charter of Wislica, to unite the new extensive domains of his crown and to give them a single common law.

XI. 13—Kasimir the Great

Kasimir was Poland's first great law-giver, and this Charter of Wislica the Poles regard as the finest monument of their native law.[14] And yet it was not pure Slavic law. Kasimir in A. D. 1364 had founded the University of Krakow

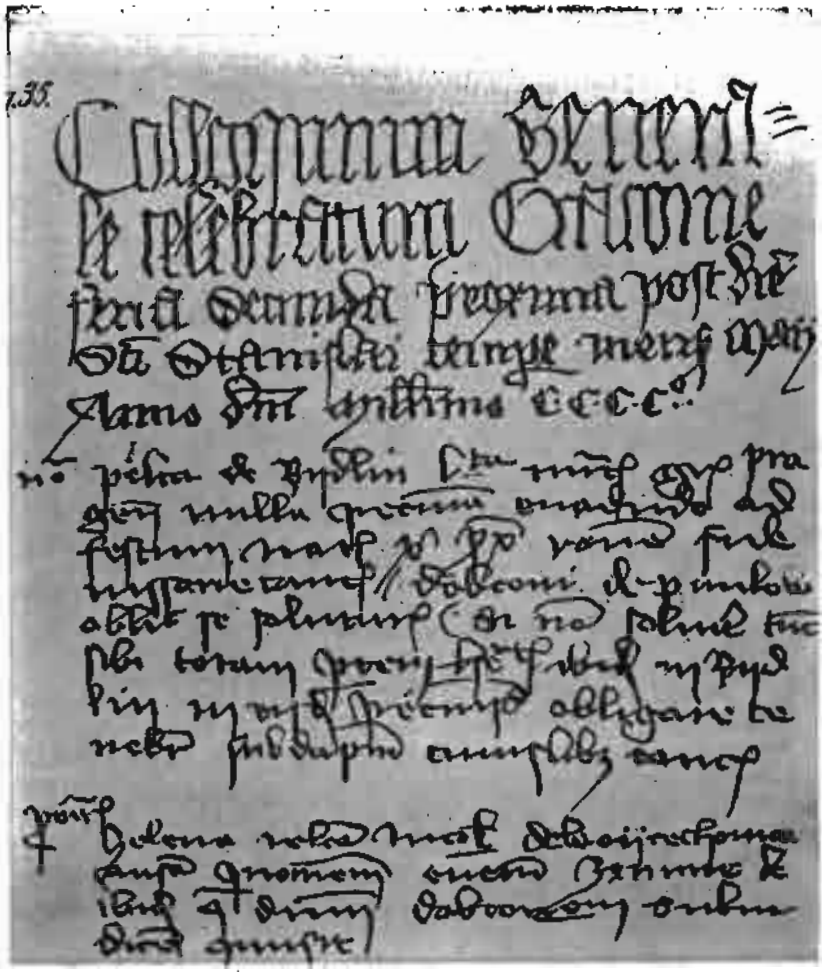
on the models of Bologna and Paris; had dreamed of propagating the study of the new Roman legal science; and had imported French and Italian jurists to help draft his code. The Romanesque law was already filtering in, and the Roman Church with its ecclesiastical law was powerful. Latin, not Polish, was the language of the statutes and the court records. A record,[15] in Latin, from the Court of Krakow, A. D. 1400, reads:[d]

XI. 14—Kasimir Bestowing the Charter of Wislica

"General Session held at Krakow, May 10, 1400. Note that Pelca of Bydlin has bound himself to pay fifty marks of Prag money on Christmas next, with Dobcon of Paulow as surety; if he does not pay, then all of his estate at Bydlin is security for the said default.

"Helen, widow of Nicholas of Wojcechovice, brings suit for an affair against Master Dobcon".

Thus we find the same meagreness as in the Bohemian records,—a mere minute of the claim; no opinions, reasons, or citations,—in striking contrast to the English year-books of the same period.



XI. 15—Court Record of Krakow, A. D. 1400

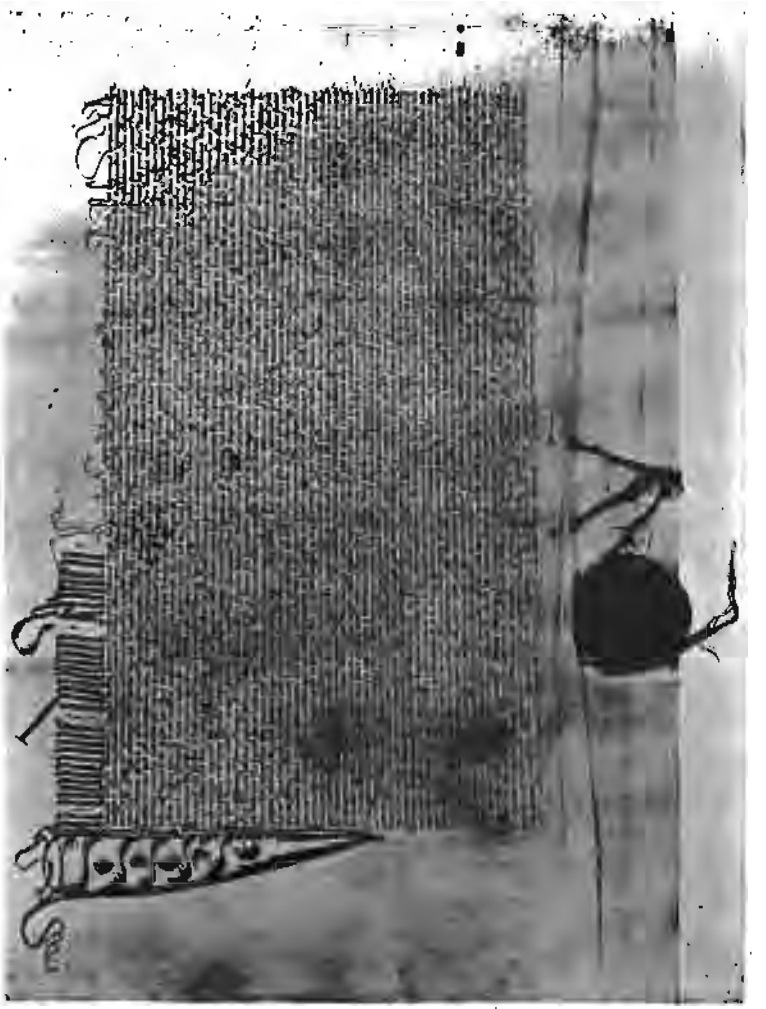
The term for "general session" here is "colloquium generale" (line 1), the entry begins: "Colloquium generale celebratum Gruvine feria secunda proxima post diem Svati Stanislai tempore mensae maii anno domini millesimo c.c.c.c."

XI. 16—Cloth Merchants' Hall at Krakow

But, besides the Roman law, the influence of Germanic law was also strong; for German merchants had settled in all the large towns; their own mercantile courts were held in their great guild halls, like the one at Krakow,[16] and appeals were taken to Magdeburg in Germany, the headquarters of Saxon mercantile law.

7. Meanwhile, the Polish nobles had become restive. Under the indolent Kasimir IV, of the Jagiello dynasty, the fatal Slav tendency to dissension began to undermine Poland's future. In A. D. 1454, Kasimir IV then being king, the nobles wrested from him a charter of privileges, the Constitution of Nieszawa,[17] which formed the first national constitution, and virtually placed the government in the hands of a parliamentary oligarchy. This statute has been called the Magna Carta of Poland. But in England the weak King John, who yielded to the barons, was soon replaced by the mighty Edward, who proved himself their master; while in Poland the trend was exactly the opposite. Forty years later the Polish nobles fixed by law the status of their peasants as serfs; and the nobles' privilege to hold their own baronial courts independent of the king was confirmed.

The climax came in 1505, at the Parliament of Radom, where the nobles established the political principle that was to seal Poland's future doom,—the "Liberum Veto".



XI. 17—Constitution of Nieszawa, A. D. 1454

The exact words were:[e] "nihil novi constitui debet . . . . . sine communi consiliorum et nuntiorum terrestrium consensu". This is the rule that all parliamentary action must be by unanimous vote; a single negative vote meant no new law. Even on appeal from the courts, a single veto in the Senate could annul the decree. This was the Slavic spirit of egocentric secession and dissension apotheosized. It prevented Poland from ever developing a strong unified political and legal system.

Many able jurists indeed arose, notably Stanislav Konarski, in the 1700's,[18] a priest, who strove single-handed and unofficially to harmonize and codify all Poland's heterogeneous laws. But no genuine legal profession had ever arisen in Poland. And the constant political dissensions made all legislative efforts futile. For example, during the entire thirty years of Augustus III's reign, in the 1700's, there was

XI. 18—Konarski the Jurist

only one Parliament that had not broken up in disorder.

8. The end is known to all. Poland was cut up and apportioned to the neighboring powers. During Napoleon's brief control, in 1808, the Code Napoleon was put into force, superseding the ancient laws.[19] How greatly

XI. 19—Code Napoleon, in Russian, for Poland

Romanized the Polish law had already become may be inferred from the fact that in the 1700's the statutes were already full of such slavized Roman terms as "obligi", "donacye", "kontrakty", "testamenta". And after Napoleon's fall, the Code Napoleon was retained in force in Russian Poland. Its title-page shows the hybrid result (from an edition of 1896),—a Russian text, for the Poles, of a code frankly called Code Napoleon; and the first section is a literal translation from the French, "Tous les biens sont meubles ou immeubles", "All property is either movable or immovable".

XI. 20—Chairman of the Polish Code Commission 1927, Dr. Fierich

After the World War, the reunited Poles resolutely strove to re-cast and unify their legal system.[20] But it could not be a distinctively Slavic system.

(III) Yugoslavia

9. The Checks and the Poles had received Christianity from the west,—Latin Christianity from Rome. But the southern and eastern Slavs received Christianity

from Byzantium, Greek Christianity. And this difference deeply affected the course of their legal history. Moreover, there were great differences of climate and habits. While one branch of the Slavs had made its permanent home in the vast marshy plains of Poland, another branch found itself equally at home in a land of striking contrast,—the mighty mountain ranges of the Balkans.[21] Serbs, Bulgars, Croats, Montenegrins,—these South Slavs, in various tribes, by A. D. 600 had overrun this region of deep valleys and lofty peaks. It has long been a region of racial strife and tribal warfare between these sturdy and unruly mountaineers. On the east, in Bulgaria, a Slavic shepherd people had settled; but they had early been mastered by the nomadic mounted warriors from Asia, and so their ruling class was of Tartar blood, but slavized. On the west, at the Dalmatian coast, with its deep harbors, its cliffs and crags rising sheer from the sea, and its towns crowded into the narrow beach,[22] the people were nearly pure Slavs, though overlaying an ancient Romanized population.

10. But on both east and west they were in close contact with peoples having highly developed legal systems,—on the east, and very early, with the Greek Empire at Constantinople, where for centuries the Roman laws had prevailed, in the Greek language; and on

XI. 21—Castle of Sokol, in Serbia

XI. 22—Cattaro, in Dalmatia

XI. 23—SPALATO, ON THE DALMATIAN COAST

the west, and later, with the Italians at Bologna and Ravenna, where Justinian's laws had recently been resurrected in the 1100's (*post*, Chap. XV). Thus the Slavic legal institutions, in the Balkan peninsula, when they took form, were shaped by these alien systems, ultimately meeting the same fate as the first and the second Slav branches already noticed.

This is illustrated in the law-code of the Duchy of Spalato, in Dalmatia, dating about A. D. 1300. This city[23] arose on the site of the Roman Emperor Diocletian's massive palace, to which he had retired on his abdication, about A. D. 300. (It was here that he made his famous

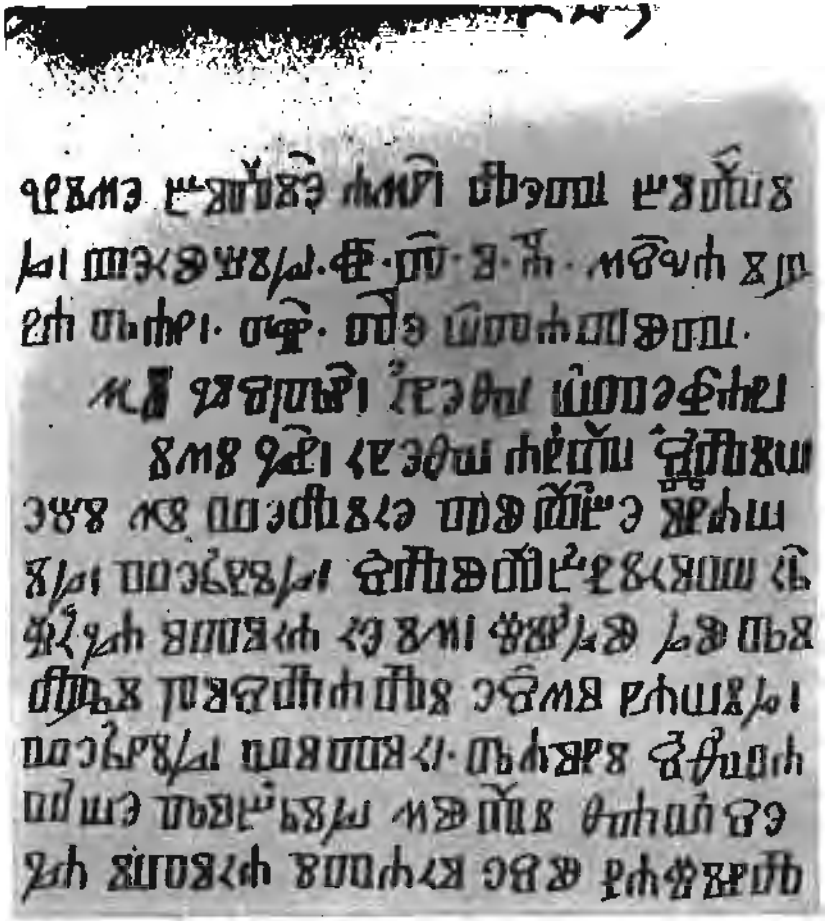
XI. 24—Law-Code of Spalato, A. D. 1312

reply to his former colleague Maximian, who wrote to warn Diocletian of the troubles in the empire and to urge him to resume the throne.[f] "You would never" replied Diocletian "make such a proposal, if you could see the fine cabbages which I have raised here with my own hand in my garden"). The population of Spalato was nine-tenths Slavic; but this elaborate code of several hundred sections is in Latin.[24] Venice had conquered this coast three centuries before, and the patriotic ceremony, on every Ascension Day, of the Doge marrying Venice to the Adriatic Sea with a ring, was instituted in celebration of this conquest. The influence of the Roman law from Venice is plainly betrayed in the last sentence of the opening paragraph of the Spalato code; it commands the people that they "live honorably, injure no man, and yield to every one his rights", and this celebrated sentence, of course, is borrowed literally from the opening chapter of Justinian's Digest.

But, for the remaining Yugoslav regions, the modifying influence came from Constantinople, where Roman-Greek law prevailed. Just off Fiume, near Trieste, is the large island of Veglia,[25] once the seat of the Duchy of Verbenik, an ancient Slavic community, and the only one still using the Glagolite script. The Glagolite script arose in this way: About A. D. 900, the great Greek missionary

Cyril had gone up from Constantinople into Russia and converted the Slavs there and taught them letters, mixing their runes with the Greek alphabet; which has ever since remained the alphabet for Russia, Bulgaria, and Serbia. But much earlier, about A. D. 400, the learned Jerome (translator of the Greek gospels into Latin), who was himself a native of this region, had devised for its people a peculiar alphabet, founded largely on the Slavic runes. This older form was called Glagolite, and was used for the literature of those regions,[26] till superseded in modern times by Latin script. But even today it persists

XI. 25—Veglia: Castle of the Duke



XI. 26—Law-Code of Verbenik, A. D. 1388

The opening lines read: "V imye bozhye, amen. Let bozh-yikh tekushtshikh 1388 myestsa yuna den 15 dze statut"

in the church books, and the Bishop of Dalmatia, in the new nation of Yugoslavia, was not long ago negotiating with the Pope to be allowed to continue the use of this ancient script. So these oldest laws are unique in being written in this Glagolite script.[26] In this Law Code of Verbenik (A. D. 1388), the opening sentence reads:[8]

"In the name of God, Amen. Year of our Lord 1388, month of June, day 15.

"We Count Stephen and Count Anx, having heard the heavy complaints of our faithful subjects of the Verbenik domain, that the people are oppressed, have sent our trusted deputies to summon good and true men from the whole domain, and also women, so that right and truth may be established and wrongs be punished."

But the most noted legal monument of the Yugoslavs is the code of the hero-king of Serbia, Stefan Dushan, who reigned for twenty years from A. D. 1336. His nickname Dushan means "throttler"; for he strangled his own father to reach the throne. His reign is the golden age of the Yugoslavs; and Serbian patriotism dwells on the historic scene of Stefan's coronation.[27] He was educated in Constantinople; and as patron of learning he founded schools, imported foreign scholars, and gave to the Serbs their first national code,—and their last, until our own day. It was written in the Cyrillic (or Russian) Greek alphabet; and naturally it was permeated with Roman-Greek ecclesiastical and civil law. Its first paragraphs read:

XI. 27—Coronation of King Stefan of Serbia

"1. Justice shall be done according to the Christian religion. 2. Nobles and others shall not marry without the blessing of the bishop or of a clerical appointed by him. Marriages not made with the Church's blessing shall be declared void."[h]

The manuscript of the code is in the National Museum at Praha in Bohemia;[28] there are only three extant; and it is a melancholy fact that Serbia does not possess any of the original manuscripts of her historic national code.

11. For Stefan's successors quarreled; the racial Slav trait of dissension undermined the kingdom; and within a century after Stefan, about A. D. 1460, Serbia and the Balkans had become a fief of the Mohammedan Turkish empire. A large number of the Yugoslavs became Mohammedans; and one of the most important Turkish law schools, educating judges in Mohammedan law, was located in Sarayevo, in Bosnia. Then, in the last century, Austria came to dominate in the Balkans, and thus a

XI. 28—Code of Stefan Dushan

XI. 29—The Court-House at Sarayevo

third alien element, the Germanic-Romanesque, entered into the legal system. In 1844, Serbia, being semi-independent of Turkey, adopted its own civil code, based largely on the Austrian model. The court-house[29] at Sarayevo (the capital city of Bosnia, and the starting point of the great world-conflagration of 1914), is a symbol of the hybrid legal character of this region; for it is a court-house built by the Austrians, in a Turkish style of architecture, for a Slav city having a population one-half Slav and one-half Mohammedan.

The Yugoslavs are now independent politically. The capital city of Belgrad is today adorned with a royal palace, a university, and other public buildings in a cosmopolitan architecture that would suit almost any capital. French and German legal science for a century past has shaped the law of Yugoslavia; and no distinctive Slavic legal system can be found here.

(IV) Russia

12. The fourth principal branch of the Slavic race includes, of course, several groups, differing in dialect and in customs. The Russian territory covers more than one-half of the area of Europe. But in spite of its vast area, it is the only branch of the Slavic race that has achieved and maintained political unity and independence. This

welding, however, was perfected only by the hammer of despotism.[80]

There were four marked periods in its legal evolution, beginning in the 1100's, the 1400's, the 1600's, and the 1800's. The first period represents primitive legislation and the foundation of numerous separate principalities in Kief, Novgorod, Moscow, and elsewhere. The second period represents the arrival of political unity and a centralized feudalism. The third period saw the establishment of autocracy, and the development of that strong central bureaucracy which necessarily accompanies an efficient despotism. The fourth period was marked by the creation of a genuine national legal system.

CHART OF PERIODS

A. D.		
1100 1200 1300	Primitive legislation Separate principalities in Kief, Novgorod, Moscow	Code of Yaroslav
1400 1500	Political unity attained, with centralized feudalism	Codes of Ivan III and Ivan IV
1600 1700	Autocracy established Bureaucracy developed	Code of Alexis
1800	Complete legal system framed	Code of Nicholas I

XI. 30—Map of Russia

XI. 31—Oleg the Wise

And yet this system, from the very beginning, was not, and could never be, purely a Slavic product. It was hybrid; for it was made up of Germanic, Slavic, and Greco-Roman elements.

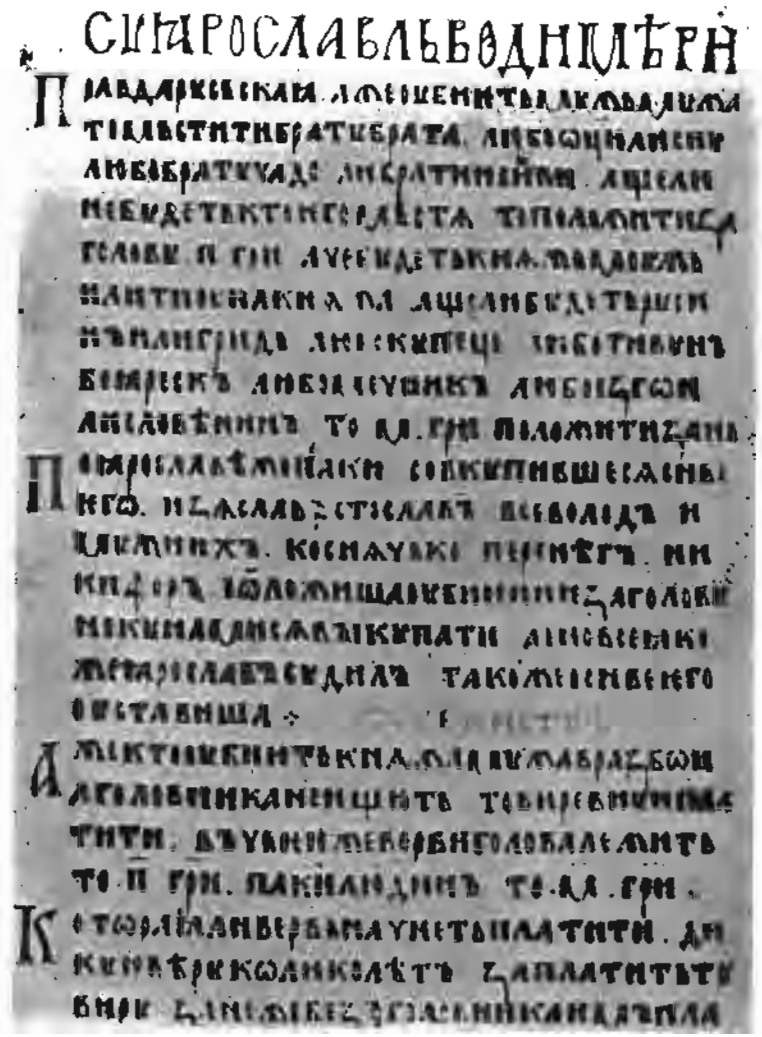
13. Slavic Russia was overrun in the 800's by bands of bold Germanic land-rovers from Scandinavia. Oleg the Wise was the greatest of these early Northmen, the second in time; he became master of Kief, in the southwest.[31] He and his fierce vassals—later known as "boyars", and famous in Russian folklore—organized the Slavic people,—much as Duke Rollo and his Northmen,

about the same period, conquered and organized Normandy. These Germanics, however, were essentially traders; and the earliest document of Russian history is a treaty of commerce between Oleg and the Greek Emperor at Constantinople. Their chief trade was in slaves; during three centuries they made merchandise of the conquered Slav population to the effete Greek emperors (some scholars believe that our

XI. 32—Yaroslav the Just

word "slave" signified originally "a Slav"); and the vast extent of serfdom in later Russia originated in this early slave-system. Meanwhile, under Duke Vladimir, about A. D. 1000, the Russians accepted Christianity from the Greek missionaries coming from Constantinople. The Greek alphabet was now adapted by the missionaries to the language of the Slavs, who had no books and no alphabet of their own but only a few crude runes, or word-symbols; and henceforward the Greco-Roman religion, morals, and law dominate in Russian life.

The first traditional lawgiver is Yaroslav the Just,[32] son of Vladimir; he lived about A. D. 1015-50; but the oldest extant text of his code dates actually from his successors, about A. D. 1200. This Code of Yaroslav was called "Russian Truth" ("Pravda Russkaya"); and it was really drafted or inspired by the Greek ecclesiastics, for the information of the church courts. It represents a mixture of Germanic, Slavic, and Roman-Greek elements.[33] It was modeled on the Roman-Greek law-books of Constantinople; and the Greek church had already for three centuries been modifying the native Slav customs in family and property relations. How primitive was this code can be seen from the first paragraph, in which the churchly legislators were attempting to restrict while tolerating the fierce practice of the blood-feud,—a practice



XI. 33—Code of Yaroslav

which lasted in Russia long after it had died out in western Europe:[3]

"The Justice of Yaroslav son of Vladimir:
Russian Truth

"1. If a man kills a man, vengeance may be done by brother for brother, or son for father, or father for son, or uncle for nephew.

"2. If there is none to do vengeance, then shall the killer pay eighty shillings if the killed is a chieftain or a chieftain's vassal.

"3. If the killed is a Russ or a merchant or a henchman or a sworded man or a Slav, then forty shillings shall be paid."

14. By the 1400's the second period in Russian history is entered. The many petty chieftains in this broad land had been consolidated into an independent kingdom, under Ivan III, known ever since as Ivan the Great. The country had been freed from the overlordship of the Asiatic Tartars, and Moscow was now the capital. Ivan III, by marrying the daughter of the last Greek emperor, made Russia the heir to the Greek Imperial traditions. Ivan III began the vast fortress-city and palace of the Kremlin, which was thereafter to be the centre of Russian traditions of government and justice;[34] and this second period now sees the establishment of political unity and a centralized feudalism, like that of William the Conqueror.

There were indeed many judges in the ducal or feudal courts, doing a crude justice based on local customs. Ivan

XI. 34—The Kremlin

once called to account a local judge for accepting money from both parties, and more from one party than the other; whereon the magistrate naively replied, "Sire, naturally I should put more faith in the word of a rich man than of a poor man". But gradually the theory prevailed that justice was the personal prerogative of the supreme central ruler at Moscow. In the Kremlin was the palace, and from a window in the corner of the Throne Room[35] a rope hung down, with a basket at the end, and each day the prince might draw up the basket and read the petitions of grievance from his subjects. Even as late as the day of Peter the Great, A. D. 1700, it was still the popular custom to go to the Cathedral of the Archangels, a church within the Kremlin walls, containing tombs of the Tsars, and place on the tombs the petitions of grievance, and the Tsar would go and read them; for he once held a court of justice there.

The title of Tsar, or Caesar, was first assumed by Ivan IV (the Terrible), in this period, about A. D. 1550, and his strong personal character served to fix on Russia until modern times the principle of personal absolutism. Ivan was the Tsar who built the Cathedral of St. Basil, within the Kremlin wall,—the most bizarre edifice in the world's architecture, and a fitting memorial of his bizarre character. He led the nation ably in its external troubles;

XI. 35—Throne-Room in Terem Palace

XI. 36—Ivan in Remorse at Slaying His Son

and his name goes with a crude code of A. D. 1550. But his domestic government must have debased and stifled all conceptions of law and justice. He was the founder of the bureau of secret political police, which cursed Russia ever after, and violated all fundamentals of justice; and in personal character he was nothing less than a monster of unparalleled ferocity and incredible depravity. A sober German historian calls him "a raging hyena".

To describe in a few words his lifelong enormities is impossible. He put to death his own Chancellor with his entire family. He grilled alive one of his princes in an enormous frying-pan. He nailed the French ambassador's hat to his skull, for a fancied insult. He ordered whole villages to be drowned. He forced fathers to execute their sons, and sons their fathers. He even killed his own son in a fit of anger.[36] Ivan invented the punishment of

rebellion against their feudal barons,—at that same period the Russian people, on the contrary, patiently endured this homicidal maniac as their ruler for a whole generation; the best Russian historian tells us[1] that "never a spark of open protest appeared from the people".

Ivan cruelly killed the only official who openly rebuked him, the Archbishop Philip. That incident began in the Cathedral of the Assumption. This patriot, the Archbishop, once a boyhood playfellow of Ivan's, was now a priest of unblemished integrity holding the highest office; and in Russia the Church has always wielded equal influence with the Tsar. The Archbishop had often privately pleaded with the Tsar to restrain his wicked passions. Now at last, at the public mass in the Cathedral of the Assumption, in 1568, when the Tsar came with effrontery to ask a blessing, the indignant Archbishop denounced him before the congregation in fearless language: "Instead of God's blessing, fear thou rather the judgment of God, to whom only a pure heart can be offered. How long will thy unrighteousness reign on Russian soil? The very heathen have laws and justice, only in Russia is there none. But there is a judge on high; how wilt thou dare appear before him?" The enraged Ivan swore aloud in the church that he would behave as he saw fit, arrested the Archbishop at the next

XI. 38—The Grand (or Red) Square, Moscow

high mass, cast him into a prison cell, and had him strangled.

This ruthless personal dictatorial justice, as a trait of the Russian ruling family, endured even till the time of Peter the Great, in the early 1700's. When Peter was menaced by a rebellion of his famous bodyguard, the Streltsi, and suspected his own sister Sophia of complicity, he kept fourteen torture-chambers with gridirons burning day and night, and attended unwearyingly, even at the torture of his sister. In three weeks one thousand of these Streltsi were executed in the Grand Square; and Peter not only beheaded one hundred of them with his own hands, but cordially invited the foreign ambassadors to come and wield the axe with him! In the year 1721 he put his own son Alexis on trial for sedition; whether Alexis was guilty or not, historians differ; but it is known that Alexis was tortured by his father's own hand, and died on the next day after this dreadful act.

15. Such a record of arbitrary rule explains the slow development of systematic law and procedure in Russia. An English official, writing in rhymed letters to his English friends on Russian manners, in the same year 1568 of Ivan IV's persecution of the Archbishop, thus sums up his observation:[k]

"In such a savage soile, where lawes do bear no sway,
But all is at the king his will, to save or else to slay,
. . . . Conceive the rest your selfe, and deeme what lives they lead,
Where luste is Lawe, and subjects live continually in dread".

And an observant English ambassador, Fletcher, about A. D. 1590, in the next reign, thus concludes his observations on the Tsar's courts:[l]

"They have no written law, save onely a smal booke, that conteineth the time and manner of their sitting, order in proceeding, and such other judicial forms and circumstances; but nothing to direct them to give sentence upon right or wrong. Their onely law is their 'speaking law', that is, the pleasure of the prince, and of his magistrates and officers. Which sheweth the miserable condition of this poore people that are forced to have them for their law and direction of justice, against whose injustice and extreame oppression they had neede to be armed with many good and strong lawes."

The regular procedure of the courts, as late as the end of the 1500's, seems to have still retained the crudest features, content to employ constantly the compurgation oath, the lot, and the duel in its coarsest form, as modes of decision. The criminal procedure is thus described by an Austrian envoy, a famous cosmopolitan traveler, sometimes termed "the discoverer of Russia"; he writes about the middle of the 1500's:[m]

[*Criminal Procedure in the 1500's.*] "Whoever wishes to lay an accusation against another for theft, plunder, or manslaughter, goes

to Moscow and asks that such an one be summoned to justice. A process-server is given to him, and he appoints a day, which he announces to the man against whom the accusation is laid, and on that day he brings him to Moscow. Afterwards, when the guilty man is brought to judgment, he often denies the crime which is laid to his charge. The testimony of one nobleman is worth more than that of a multitude of low condition. Attorneys are very seldom allowed: every one explains his own case. If the prosecutor produces witnesses, then both parties are asked whether they will stand to their words. The common reply to that is, 'Let the witnesses be heard according to justice and custom.' If they bear witness against the guilty man, he immediately objects, makes exceptions against themselves and their testimony, saying: 'I demand an oath to be administered to me, and I commit myself to the justice of God, and desire a fair field and a duel.' And thus, according to the custom of the country, a duel is adjudged to them. Either of them may appoint any other person to take his place in the duel, and each may supply himself with what arms he pleases, except a gun or a bow. But they generally have oblong coats of mail, sometimes double, a breastplate, bracelets, a helmet, a lance, a hatchet, and a peculiar weapon in the hand, like a dagger sharpened at each end, which they use so rapidly with either hand as never to allow it to impede them in any encounter, nor to fall from the hand; it is generally used in an engagement on foot. They commence fighting with the lance, and afterwards use other arms. . . . . Each side has many friends, abettors, and spectators of the contest, who are quite unarmed, except with sticks, which they sometimes use. For if any unfairness seem to be practised upon either of them, the friends of that one immediately rush to avenge his injury, and then the friends of the other interfere, and thus a battle arises between both sides; which is very amusing to the spectators, for the hair of their heads, fists, clubs, and sticks burnt at the points, are all brought into play on the occasion."

The civil procedure was no less crude in methods. It is thus described, as of the end of the 1500's, by the English envoy Fletcher:[n]

[*Civil Procedure in the 1500's.*] "Their courts of civil justice for matters of contract, and other of like sort, are of three kinds, the one being subject unto the other by way of appeale. The lowest court (that seemeth to be appointed for some ease to the subjects) is the office of the 'bugnoy starust', that signifieth an alderman, and of the 'sotskoy starust', or bailief of the soake or hundred. . . . . The second is kept in the head townes of every province or shire, by the said dukes and diacks, that are deputies to the foure lords of the chetfirds (as before was sayd). From these courts they may appeale, and remove their suites to the chiefe court, that is kept at the Mosko, where are resident the officers of the foure chetfirds. These are the chiefe justices of judges, every of them in all civill matters that grow within their severall chetfird or quarter, and may be either commenced originally before them, or prosequuted out of the inferiour courts of the shires by way of appeale.

"Their commencing and proceeding in civill actions is on this manner. First, the plaintife putteth up his supplication, wherein hee declareth the effect of his cause or wrong done unto him. Whereupon is granted unto him a 'wepis' or warrant, which hee delivereth to the 'praestave' or sergeant, to doo the arrest upon the partie whom he meaneth to implead. Who, upon the arrest, is to put in sureties to answere the day appointed, or els standeth at the sergeants devotion, to be kept safe by such means as he thinketh good. The sergeants are many, and excell for their hard and cruell dealing towards their prysoners; commonly they clappe irons upon them, as many as they can beare, to wring out of them some larger fees. Though it bee but for sixe pence, you shall see them goe with chaynes on their legges, armes, and necke.

"When they come before the judge, the plaintife beginneth to declare his matter after the content of his supplication. As for attourneis, counsellours, procuratours, and advocates, to plead their cause for them, they have no such order, but every man is to tell his owne tale, and plead for himselfe so well as he can.

"If they have any witnesse or other evidence, they produce it before the judge. Such kinde of suites as lacke direct evidence, or stande upon conjectures and circumstances to bee waighed by the judge, drawe of great length, and yeeld great advantage to the judge and officers. If the suite be upon a bond or bill, they have for the moste parte good and speedy justice. If they have none, or if the truth of the cause cannot so well bee decerned by the plea or evidence on both partes: then the judge asketh eyther partie (which hee thinketh good, plaintife or defendant) whether hee will kisse the crosse upon that which he avoucheth or denieth. Hee that taketh the crosse (being so offered by the judge) is accounted cleare, and carrieth away the matter. This ceremonie is not done within the court or office, but the partie is carried to the church by an officer, and there the ceremonie is done: the mony in the meane while hanging upon a naile, or else lying at the idols feete, ready to be delivered to the partie as soone as he hath kissed the crosse before the said idol. This kissing of the crosse (called Creustina chelovania) is as their corporall oath, and accounted with them a very holy thing, which no man will dare to violate or prophane with a false allegation.

"If both parties offer to kisse the crosse in a contradictorie matter, then they drawe lottes. The better lotte is supposed to have the right, and beareth away the matter."

Even before the Tsar himself, the same primitive methods of the lot and the duel still obtained, as we learn from the experience of an English merchant who sought

the Tsar's justice to decide a money dispute with some Russian merchants:[o]

[*A Civil Trial before the Tsar.*] "Sundrie Russian merchants . . . . . were then driven to credite us and compound in value untill the next returne. At which time, notwithstanding good accompt in the value of 600 robles, there grewe question by their double demand. So in April Anno 1560, before my comming from Moscovia, they obtained trial by combat or letter to have their summe double, or as I proferred 600 robles. For combatte I was provided of a strong willing Englishman, Robert Best, one of the companies servants: whome the Russes with their Champion refused. So that we had the words of our privilege put in effect, which were to draw lots. The day and maner of triall appointed by the Emperour at his castle in his palace and high Court of Moscovia was thus: The Emperours two Treasurers, being also Chancelours and chiefe Judges, sate in court. They appointed officers to bring me, mine interpreter, & the other through the great presse within the rayle or barre, and permitted me to sit downe some distance from them: the adverse parties being without at the barre. Both parties were first perswaded with great curtesie, to wit, I to enlarge mine offer, and the Russes to mitigate their challenge. Notwithstanding that I protested my conscience to be cleere, and their gaine by accompt to bee sufficient, yet of gentlenes at the magistrates request I made proffer of 100 robles more: which was openly commended, but of the plaintifes not accepted. Then sentence passed with our names in two equall balles of waxe made and holden up by the Judges, their sleeves stripped up. Then, with standing up and wishing well to the trueth attributed to him that should be first drawen, by both consents among the multitude they called a tall gentleman, saying: Thou with such a coate or cap, come up: where roome with speede was made. He was commanded to hold his cappe, wherein they put the balles, by the crowne upright in sight, his arme not abasing. With like circumspection, they called at adventure another tall gentleman, commanding him to strip up his right sleeve, and willed him with his bare arme to reach up, and in Gods name severally to take out the two balles: which he did, delivering to either Judge one. Then with great admiration the lotte in ball first taken out was mine: which was by open sentence so pronounced before all the people, and to be the right and true parte. The chiefe plaintifes name was Sheray Costromitsky. I was willed forthwith to pay the plaintifes the summe by me appointed. Out of which, for their wrong or sinne, as it was termed, they payd tenne in the hundred to the Emperor. Many dayes after, as their maner is, the people took our nation to be true and upright dealers, and talked of this judgement to our great credite."

16. However, a new period for Russia had already dawned before Peter's day, under the Tsar Alexis, a constructive mind, who reigned from A. D. 1645.[39] This marks the third period in Russian government and law. The definite cleavage now took place, in future destiny, between a representative

XI. 39—The Tsar Alexis

XI. 40—Nashchokin, the Reform Chancellor

government and an autocratic government. There had indeed been a Duma, or king's privy council, which functioned also as a Supreme Court, and might have become an independent King's Bench, as in England. And there had been an occasional Zemsky Sobor, or national assembly, which might have become a permanent representative Parliament, as in England. But these embryo institutions failed to mature. The historic associations clustering around the Kremlin are not those of a Westminster, but rather of a Newgate. All constitutional power, legislative, judicial, and executive, henceforth centered in the Tsars.

But Alexis was a worthy wielder of this power. The great figure of the 1600's is Alexis' chancellor, Nashchokin, a genuine organizer and reformer.[40] Nashchokin was much hated for his reforms; but he was efficient. He built up a centralized bureaucracy which enabled Russia

to cope with the complexity of its enormously increasing dominions. One of his epigrams was: "Better than strength is thought. Let us sell our soldiers and buy a man of thought". Nashchokin may almost be compared to Louis XIV's great minister Colbert; for he summoned a codifying assembly and in six months produced a concise code,—known as the Ulozhenie, or Regulations, of Alexis. It was framed largely on the basis of the Greco-Roman church and civil laws, and it managed to carry Russia haltingly through two centuries.

But by the time of Peter the Great,[41] in the early 1700's, the most pressing internal problem had become the codification of the ever-increasing mass of decrees, regulations, and local codes which had accumulated in the wide Russian territories. The administration of justice was largely done in the local peasants' courts, by unlearned magistrates, on the basis of custom and morality. No legal profession, in our sense, had yet developed, even in Peter's time; there were no jurists, no professors of law, no law-schools, no Inns of Court, no law-treatises, no reports of decisions. There is an anecdote of Peter the Great, when he visited England, and was asked about lawyers in Russia; he replied, "I have only two lawyers in Russia, and when I get back I mean to kill off one of them". The only judicial or juristic figure who is found

XI. 41—Peter the Great

named in five centuries of Russian history is the Chancellor Nashchokin above mentioned. The decrees and ordinances were in a formless chaotic mass. How enormous had become the problem of codification may be seen from the fact that in the period 1600-1800 no less than thirty thousand laws and decrees were on record. So Peter appointed a codifying commission in the year 1700.

But now was seen the astonishing spectacle of ten successive code-commissions, one after another, appointed by six successive Tsars, each commission sitting for years at a time, and deliberating through one hundred and twenty-five years in all, without reaching a result. The report of the tenth commission, dating about 1815, brought forth materials for a draft code;[43] but got no further. No finished code or compilation ever matured. Nothing but the racial Slavic tendency to theoretical dissension and indecision can account for this extraordinary failure.

Meantime, however, the sixth of these ten abortive commissions did attract wide notice throughout Europe. It was appointed by Catherine II, the German-born wife of Peter's grandson. The Tsar's justice in Catherine's day was in low repute; she corruptly and callously sold her offices and her justice to the highest bidder. A

СИСТЕМАТИЧЕСКІЙ СВОДЪ

СУЩЕСТВУЮЩИХЪ

ЗАКОНОВЪ

ПРАВО ГРАЖДАНСКОЕ.

ТОМЪ ПЕРВЫЙ.

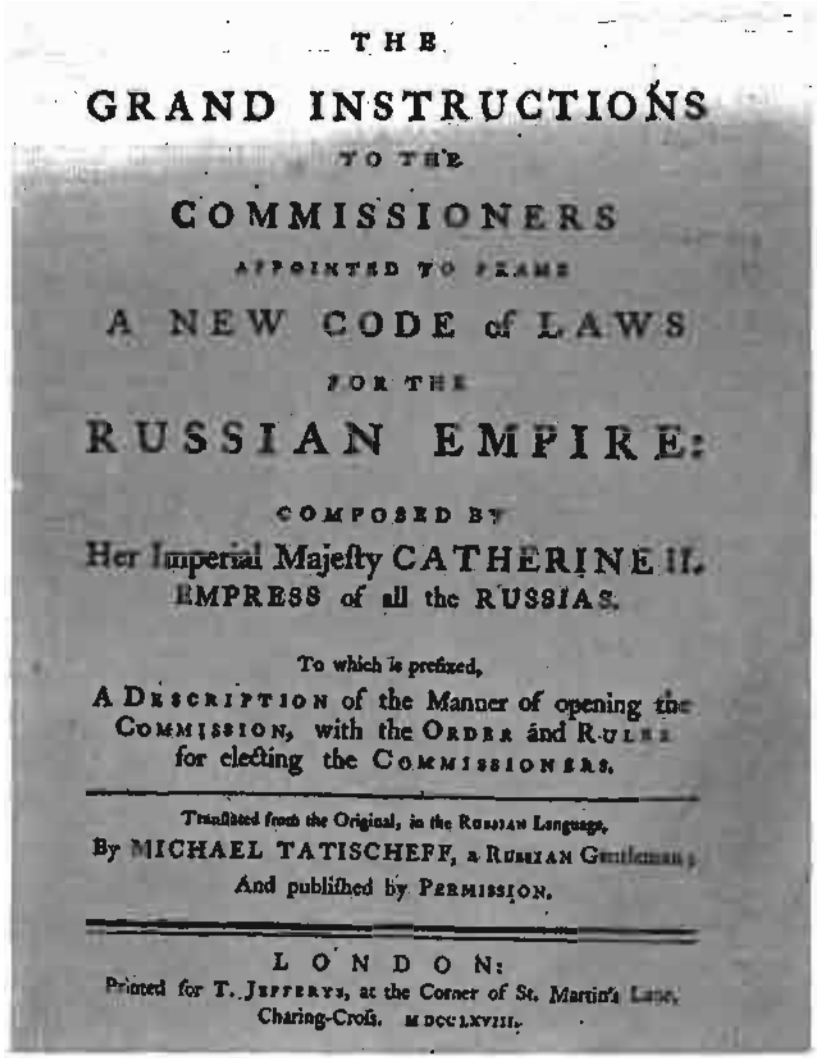
XI. 42—Draft Code of 1815

popular proverb ran:[9] "Zakon chto dyshlo; kda povernich, tuda y vyshlo"; "Justice moves like the tongue of a wagon; it turns whichever way you pull it". Another proverb said: "Do not fear the judgment; fear the judge". Nevertheless, Catherine,[13] being a brilliant showy character, undertook to stage one of the most pretentious programs of law and justice ever recorded in history. On July 31, 1767, she summoned all the dignitaries of the realm to the Kremlin, with a formal pomp whose description reads like an imperial coronation. How competent the assembly was for the task may be inferred from

XI. 43—Catherine II, Would-Be Codifier

the fact that some of the delegates could not even write their own names. But the brilliant Catherine had read the latest fashionable books of Beccaria, Montesquieu, and other philosophers and reformers of the west; and she announced to the assembled dignitaries her so-called Instructions ("Nakaz") for a code.[44] These Instructions were really a summary of principles, in some seven hundred sections; and she had composed into them a pretentious farrago of benevolence, virtue, equity, and abstract wisdom which reads like a charter of the millennium. The book of Instructions was immediately translated into half a dozen European languages; it drew from Frederick the Great a letter of fatuous flattery. The Code Assembly met in the Golden Hall of the Granovitaya Palace, and set to work; it was in this hall that the last of the ephemeral National Assemblies had met, a century before; and here the earlier Tsars had sat to do justice.[45] And now all Europe awaited the result of this assembly.

But the result, as before, was nothing. At the end of six months Catherine impatiently dissolved the general assembly and sent them home, each with a gold medal of honor; certain committees remained in deliberation for another seven years, agreed on the classification of materials, but got no further; and were finally disbanded by



THE

GRAND INSTRUCTIONS

TO THE

COMMISSIONERS

APPOINTED TO FRAME

A NEW CODE of LAWS

FOR THE

RUSSIAN EMPIRE:

COMPOSED BY

Her Imperial Majesty CATHERINE II.

EMPRESS of all the RUSSIAS.

To which is prefixed,

A DESCRIPTION of the Manner of opening the COMMISSION, with the ORDER and RULES for electing the COMMISSIONERS.

Translated from the Original, in the RUSSIAN Language,

By MICHAEL TATISCHEFF, a RUSSIAN Gentleman;

And published by PERMISSION.

LONDON:

Printed for T. JEFFERYS, at the Corner of St. Martin's Lane, Charing-Cross. MDCCLXVIII.

XI. 44—CATHERINE'S CODE INSTRUCTIONS

the fickle empress in 1774. The Code Assembly had begun as a parade; it ended as a parody.

17. But the day of a real legal system arrived for Russia fifty years later. The fourth period of Russian legal history opens under the wise and conscientious Emperor Nicholas I. He was inspired by his chancellor, Michael Speransky.[46] Speransky had started as a professor of mathematics; he ended as one of the greatest legislative geniuses of the century. It was his ambition to create a complete legal system for Russia; and though he suffered long delays, and even exile, he triumphed finally. In 1826 the new Emperor Nicholas authorized him to assemble a commission of jurists. They first spent four years in collecting and printing all the materials since Alexis' Code of 1649, in chronological order,—making forty-seven volumes, thirty-one thousand laws in all. They

XI. 46—Count Michael Speransky, the Codifier

XI. 45—Golden Hall of the Granovitaya Palace

XI. 47—Svod Zakonof, the Code of 1835

then proceeded to digest these laws into a veritable code. The task occupied six years in all; and it is recorded that the Tsar Nicholas personally attended the commission's meetings, and that every final draft was verified by him. "Svod Zakonof", "Collection of laws", was the name of the code.[47] It was in fifteen books, containing forty-two thousand articles, and went into force on Jan. 1, 1835; and every ten years or so thereafter the intervening new annual laws were interpolated at the proper place and a new edition printed.

The Svod Zakonof had compiled the laws into manageable form and had systematized the administration. On this basis, it now became the task of the Emperor Alexander I to build a reform of the laws and institutions themselves. Beginning with the abolition of serfdom in 1861, these reforms culminated in the statute of Nov. 20, 1864, for the organization and procedure of courts of justice,—a statute which embodied the most advanced

XI. 48—Palace of the Supreme Court, Moscow

principles of modern times. The re-casting of the entire substantive law was then undertaken; a scientific criminal code was enacted in 1903; and a new civil code was laid before the newly-created Legislature ("Duma") in 1907. And so, gradually through a century, the bureaucracy of an autocracy was re-moulding into a national system the complex fabric of law and justice for the vast Russian empire.

But this fabric, though genuinely Russian, was not distinctively Slavic. Catherine had built within the Kremlin the Palace of the Supreme Court; on each side of the cupola is the word "Zakon" ("Law")[48] And the elements of the new codes were as little purely Slavic as is

the architecture of this court-house; for example, Book II, of the Civil Code, on Property, began exactly in the words of the Code Napoleon, "All property is either movable or immovable". Yet the codes did represent at last a true legal system, unique to Russia.

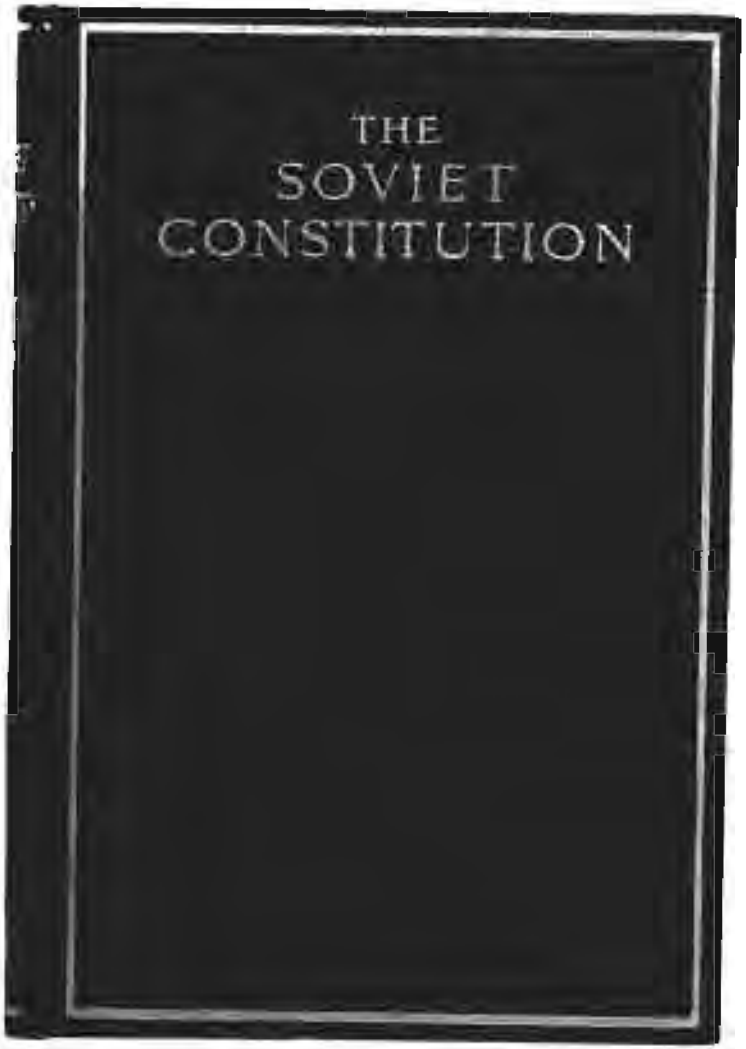
Then came the catastrophe of 1917.

18. History seems to show that only a despotism (a rational one, if possible, like that of a Nicholas, or a Napoleon) can ever hold a Slavic people together in a solid political and legal system. A supreme test came on those fateful days of November, 1917, when the emperor had been quickly deposed, the Kerensky provisional government of intelligentsia took charge, and a genuinely representative democracy at last dawned, after decades of aspiration. At this crisis of modern Russia's history, the Bolshevist conspirators, commanding only a handful of common soldiers, made an armed gesture of disorder. They began by closing the doors of the new Parliament. But then, when prompt Napoleonic action, by counter-force, was needed, the fatal Slav trait of unpractical dissension spelled failure; for the intelligentsia government now wasted three crucial days in disputing among themselves what was best to do. In that brief interval the Bolshevists supplied the decision of brute force; and the inability of Slavs to unite delivered Russia into the hands

of these ferocious political lunatics. Their reign of terror renewed the memories of Ivan the Terrible. Under Soviet Bolshevism, Russia had merely exchanged a rational despotism for an irrational one.

There is indeed supposed to be a constitution;[49] and a new legal system. There are also courts. As a sample, however, of the ideas of law and justice in these courts may serve a recorded incident of 1918. A man was charged in one of the lower courts with robbing money from a woman who was selling newspapers on the street-corner. His plea was that he was justified because she had got the money by selling papers to monarchists and other unworthy persons, while he was a good Bolshevist and hence had a better claim to the money. The court-room was crowded,[50] and the judges solemnly left it to a vote of the spectators whether he should restore the money!

XI. 50—A Revolutionary Tribunal



XI. 49—Soviet Constitution of 1918

XI. 51—The Supreme Revolutionary Tribunal, 1918

There is also now a Supreme Court, and a Ministry of Justice, so-called.[51] But in the files of the Federal State Department there is a significant memorandum from Consul Imbrie, that typical sturdy American who later passed away in Persia. As consul at Petrograd, during the Bolshevist Revolution of 1917, Imbrie forwarded to Washington a list of the new cabinet of Lenin's officials. One title on the list was "Commissar of Justice". An asterisk to this title pointed down to a sarcastic footnote by Imbrie: "A useless title. There is no justice in Soviet Russia. The world's greatest sinecure, next to taking moving pictures of a glacier, is the position of Commissar of Justice in Russia".

—In closing this survey of the four great branches of the Slavic race, one may better appreciate the reasons for the generalization offered at the beginning, namely, that with all that race's contributions to the world's thought, it has nevertheless not developed any distinctive, purely Slavic legal system. Those reasons are, first, the intrusions of other races; secondly, during the formative stage, the close proximity of more highly developed legal systems; and thirdly, and perhaps most important, the racial tendency to egocentric unpractical dissension over theories and ideals, which has left the Slavic peoples always politically divided.

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1. *Map of Slavic Regions.* Prepared by the author.
2. *Hradchany Castle, in Praha.* From a photograph by *Karl Bellman*, Prag.
3. *The Judgment of Libussa* (MS.). From a photograph, procured for the author in 1925, by *George Lusk*, of Chicago, of the original MS. known as "Libusin Soud", in the National Bohemian Museum, at Praha.
4. *The Judgment of Libussa* (scene). From a photograph, procured by *George Lusk*, in 1925, of the painting by *Fr. Zenisek*, at Praha.
5. *Town Hall at Brünn.* From the illustration in *C. E. Maurice*, "The Story of Bohemia", p. 73 (New York, Putnam, 1896).
6. *Brünn Book of Rights, A. D. 1243.* From a photograph, procured for the author in 1925 by *George Lusk*, of the original book in the Record Office at Brünn.
7. *Court Record at Brünn, A. D. 1496.* From the facsimile frontispiece in *Brandl* (cited *infra*), vol. VIII of "Libri Citationum et Sententiarum", plate V.
8. *Jus Regale Montanorum.* From a photograph, procured in 1925 by *George Lusk*, of the original MS. in the National Bohemian Museum.
9. *Charles IV Founding the University of Prag.* From a photograph by *K. Bellman* of the painting, by an unidentified artist, at Praha.
10. *The Majestas Carolina.* From a photograph, procured in 1925 by *George Lusk*, of the original manuscript in the Charles University at Praha.
11. *Budovec.* From the engraving in "Illustrirte Chronik von Böhmen" (various authors), vol. II, p. 608 (Prag, 1852).
12. *Market-place at Prag.* From the drawing by *Nelly Ericksen*, in Count *Lützow*, "The Story of Prague", p. 70 (London, Dent, 1902).
13. *Kasimir the Great.* From the portrait by *J. Mateyko*, reproduced in *E. H. Lewinski-Corwin*, "Political History of Poland", p. 54 (New York, Polish Book Importing Co., 1917).
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15. *Court Record of Krakow, A. D. 1400.* From the facsimile in "Prawa Polskiego Pomniki" (cited *infra*), vol. VIII, "Libri Judiciales Terrae Cracoviensis", tab. X, fig. 5.

16. *Cloth Merchants' Hall at Krakow.* From the illustration in *Lewinski-Corwin*, p. 61 (cited *supra*).

17. *Constitution of Nieszawa, A. D. 1454.* From the facsimile in *St. Kryzanowski*, ed., "Album Paleographicum", plate XXX (Krakow, Jagiellonski University, 1907).

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21. *Castle of Sokol, in Serbia.* From the illustration in *S. Gopcevic*, "Serbien und die Serben", p. 68 (Leipzig, B. Winckler, 1888).

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31. *Oleg the Wise.* From the drawing by *Bilibin*, as reproduced in *Sonia V. Howe*, "Some Russian Heroes, Saints, and Sinners", p. 18 (Philadelphia, Lippincott, 1917).

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36. *Ivan in Remorse at Slaying His Son.* From a photograph of the painting by *J. J. Ryepin*, in the Tretyakov Gallery in Moscow; furnished by *Elizabeth Bredin.* This painting, a part of which only appears in the view, is said to be the most horrifying in the world's galleries.

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THE
GERMANIC
LEGAL SYSTEM

XII

The Germanic Legal System

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XII. 1—A Viking Chieftain

XII
The Germanic Legal System

(I) First Period

IN the dim mists of Northern mythology, Odin, the father of the gods, the All-Father, who welcomes the souls of brave men slain in battle, ruled in Valhalla, the Hall of the Slain. Carlyle calls Odin "the type Norseman,—the chief God to all Teutonic peoples". Odin's powerful figure was the cynosure of every clan-chieftain of that mighty Germanic race, which changed the face of Western Europe, slowly but irresistibly, during the thousand years that culminated in Charlemagne's Germanic Empire.

In Norse morality, manly strength was the prime virtue. Death in battle was their hope; a "straw-death", or death in bed, was their dread. The Valkyries, the mighty maidens of Valhalla, watched lovingly over the turmoil of battle, marked with their spears those heroes worthy of death, and conducted them to Valhalla, where they were served with foaming beakers of mead, and received Odin's welcome. Even in Valhalla the souls of Norse heroes amused themselves all day long in fierce combat, hewing each other down for sport; but there, all wounds healed each evening before feast-time in the great hall.

In Norse morality, retaliation for wrongs received was a duty as well as a right. The gods upheld the stronger hand. Might proved right. "What we take by our arms we keep as our right", was their saying. The Vikings, the sea-rovers of the North, and the Goths, the land-rovers of the East, typified the urge of strong men for hardy adventure and the prizes of victory. The vocation of predatory conquest was an honorable one. They sailed all the known seas. They took booty and left their mark from Greenland and Vineland to Paris, from Spain and Sicily to Constantinople.

Vikings, Goths, Angles, Saxons, Franks—all deploy in the dawn of their careers with a racial belief in crude physical power as the basis of social order.

2. Germanic justice, as it emerges into history, is purely secular.

There was indeed a god or two, called sometimes Thor, sometimes Forsete,—Thor, as god of Law and Order, Forsete, as god of Justice. Forsete[1] lived in a castle, called Glitner, with columns of gold and roof of silver; and there he reconciled all disputes brought before him. Thor dealt out stern justice sitting under the great world-ash-tree, Ygdrasil. Thor's Day—Thursday—was the day for the assemblies to begin; and oaths were sworn in Thor's name. But the god was scarcely more than a symbol.

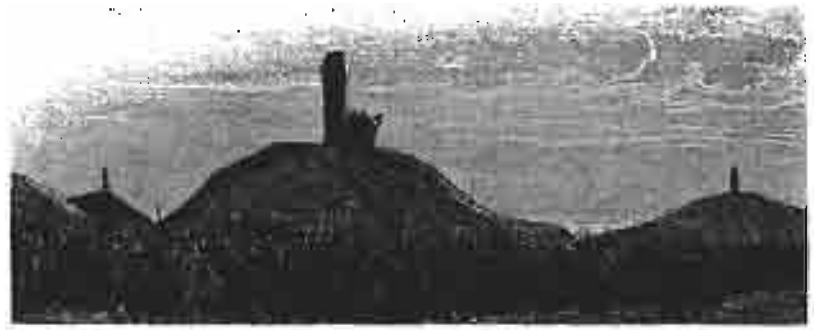
XII. 2—Forsete, God of Justice

He had no priests, and he gave no inspired laws, as in Egypt, Babylon, Judea, and India.

Moreover, Germanic justice, as in primitive Greece and Rome, was democratic.

There was, of course, a chief, or earl, of each clan, and the earl's hall was the centre of clan life.[3] There the earl did patriarchal justice among his own family and clansmen, standing on a dais in his spacious hall. For the paternal power of the chieftain and father of the family was as absolute among the Norsemen as among the early Romans. When a child was born, it was shown to the

XII. 3—A Norse Earl in His Hall



XII. 4—The Hill of Laws

father, who had the power then and there to say that it was fit for bringing up, or to order it ruthlessly exposed to die; this custom persisted in Scandinavia until Christianity was adopted in the 900's.

But the justice of the whole tribe, the settlement of disputes between clans, was done at the assembly of the people, the Al-ting, where all the free men, armed, met periodically, by a lunar calendar. The assembly, or Ting, in Scandinavia, took place in the open air, in a wooded valley, called Tingvallir, near an eminence, called the Logberg, or Hill of Laws.[4] This Hill of Laws was crowned with a huge pillar, the Ting-stone, and surrounded with stone benches for the chiefs and the bards. From this eminence, the voice of the Law-men could be heard afar. These Law-men (later known as Law-speakers) are thus

described in the oldest Icelandic law-book, the Gragas, or Book of Grey-Gooseskin:[a]

"A law-court shall we have and hold here every summer at the Al-ting. . . . . The Law-speaker shall determine who may have a place on the Hill of Laws, and one who without his permission sits there incurs a fine of three marks. . . . . The Law-speaker is bound, both here at the Al-ting and at home, to say, to any who ask him thereon, what the law commands; but he is not bound any further to give folk advice in their lawsuits. He shall also recite the Ting rules of procedure every summer, and all the other law-provisions shall he recite at every period of three summers, in case a majority of the law-court men wish to hearken thereto; the first Friday of the Ting-session shall the Ting rules of procedure be always recited, in case the law-court men have time to hearken thereto."

At these Courts on the Hill of Laws, the parties to a dispute, having duly summoned their opponents, pleaded their cause before the assembly.[s] Then one or more of the Law-speakers, venerable or clever men, like Nyal or Snorri, famed for their knowledge of the technicalities of procedure and of the tribal traditions, propounded a decision; then the assembly, by their shouts, or with clash of sword on shield, approved or disapproved the proposals of the Law-speakers;[s] for, as Tacitus tells us[b], the most esteemed sort of applause was the clash of weapons.

3. In general, in this first Germanic stage, legal justice consisted largely of precise formulas and astute wranglings over procedure; and it served mainly as a

XII. 5—A Lawsuit at the Ting

useful and at the same time exciting method of securing an interval of peace and rest from the violence of endless clan-feuds. The Saga of Burnt Njal is one continuous alternation of feuds and lawsuits.

A short extract will vividly illustrate the style of litigation.[c] In this case a series of disputes had ended in the siege of the house of Njal by Flosi and his men; the house had been fired, and Njal and his family were burnt to death. Now Njal "was so great a lawyer that his match was not to be found; all that he advised men was sure to be the best for them to do; gentle and generous, he un-

raveled every man's knotty point who came to see him about them". And so a great feud arose; but first the kinsfolk sought redress at the Al-ting. At the first meeting, notice of suit is given; at the ensuing one, the suit is heard:

[*The Lawsuit of Mord vs. Flosi.*] "It was one day that men went to the Hill of Laws, and the chiefs were so placed that Asgrim Ellidagrim's son, and Gizur the White, and Gudmund the Powerful, and Snorri the Priest, were on the upper hand by the Hill of Laws; but the Eastfirthers stood down below.

"Mord Valgard's son stood next to Gizur his father-in-law, he was of all men the readiest-tongued.

XII. 6—The Assembly Clashes Its Approval

"Gizur told him that he ought to give notice of the suit for manslaughter, and bade him speak up, so that all might hear him well.

[1] "Then Mord took witness and said, 'I take witness to this, that I give notice of an assault laid down by law against Flosi Thord's son, for that he rushed at Helgi Njal's son and dealt him a brain, or a body, or a marrow wound, which proved a death-wound, and from which Helgi got his death. I say that in this suit he ought to be made a guilty man, an outlaw, not to be fed, not to be forwarded, not to be helped or harboured in any need. I say that all his goods are forfeited, half to me and half to the men of the Quarter, who have a right by law to take his forfeited goods. I give notice of this suit for manslaughter in the Quarter Court into which this suit ought by law to come. I give notice of this lawful notice; I give notice in the hearing of all men on the Hill of Laws; I give notice of this suit to be pleaded this summer, and of full outlawry against Flosi Thord's son; I give notice of a suit which Thorgeir Thorir's son has handed over to me.'

"Then a great shout was uttered at the Hill of Laws; that Mord spoke well and boldly. . . . . .

"After that Mord sat him down.

"Flosi listened carefully, but said never a word the while. . .

"Kari Solmund's son declared his suits against Kol Thorstein's son, and Gunnar Lambi's son, and Grani Gunnar's son, and it was the common talk of men that he spoke wondrous well . . . . . .

"After that other men gave notice of their suits, and it was far on in the day that it went on so.

"Then men fared home to their booths.

"Eyjolf Bolverk's son went to his booth with Flosi, they passed east around the booth and Flosi said to Eyjolf, 'See'st thou any defence in these suits?' 'None,' says Eyjolf. 'What counsel is now

to be taken?' says Flosi. 'I will give thee a piece of advice,' said Eyjolf. 'Now thou shalt hand over thy priesthood to thy brother Thorgeir, but declare that thou hast joined the Ting of Askel the Priest the son of Thorkettle, north away in Reykiardale; but if they do not know this, then may be that this will harm them, for they will be sure to plead their suit in the Eastfirthers' court, but they ought to plead it in the Northlanders' court, and they will overlook that, and it is a Fifth Court matter against them if they plead their suit in another court than that in which they ought, and then we will take that suit up, but not until we have no other choice left.' . . . . . .

"Now the time passes away till the courts were to go out to try suits. Both sides then made them ready to go thither, and armed them. Each side put war-tokens on their helmets. . . . . .

"Now they all came together, and went straight to the court of Eastfirthers. They went to the court from the south, but Flosi and all the Eastfirthers with him went to it from the north. There were also the men of Reykiardale and the Axefirthers with Flosi. There, too, was Eyjolf Bolverk's son. Flosi looked at Eyjolf, and said, 'All now goes fairly, and may be that it will not be far off from thy guess.' 'Keep thy peace about it,' says Eyjolf, 'and then we shall be sure to gain our point.'. . . . . .

"Then lots were cast as to the declarations, and he, Mord, drew the lot to declare his suit first.

[2] "Now Mord Valgard's son took witness the second time, and said, 'I take witness to this, that I except all mistakes in words in my pleading, whether they be too many or wrongly spoken, and I claim the right to amend all my words until I have put them into proper lawful shape. I take witness to myself of this.'

"Again Mord said, 'I take witness to this, that I bid Flosi Thord's son, or any other man who has undertaken the defence made over to him by Flosi, to listen for him to my oath, and to my

declaration of my suit, and to all the proofs and proceedings which I am about to bring forward against him; I bid him by a lawful bidding before the court, so that the judges may hear it across the court.' . . . . . .

"After that he spoke in these words, 'I have called Thoro Thorodd as my first witness, and Thorbjorn as my second; I have called them to bear witness that I gave notice of an assault laid down by law against Flosi Thord's son',. . . . . .

[3] "Again Mord Valgard's son took witness. 'I take witness to this,' said he, 'that I bid those nine neighbours whom I summoned when I laid this suit against Flosi Thord's son, to take their seats west on the river-bank, and I call on the defendant to challenge this inquest, I call on him by a lawful bidding before the court so that the judges may hear.' . . . . . .

"Now Flosi and his men went thither where the neighbours on the inquest sate. Then Flosi said to his men, 'The sons of Sigfus must know best whether these are the rightful neighbours to the spot who are here summoned.' Kettle of the Mark answered, 'Here is that neighbour who held Mord at the font when he was baptized, but another is his second cousin by kinship.' Then they reckoned up his kinship, and proved it with an oath.

"Then Eyjolf took witness that the inquest should do nothing till it was challenged. A second time Eyjolf took witness, 'I take witness to this,' said he, 'that I challenge both these men out of the inquest, and set them aside'—here he named them by name, and their fathers as well—'for this sake, that one of them is Mord's second cousin by kinship, but the other for gossipry, for which sake it is lawful to challenge a neighbour on the inquest; ye two are for a lawful reason incapable of uttering a finding, for now a lawful challenge has overtaken you, therefore I challenge and set you aside by the rightful custom of pleading at the Al-ting, and by the law of the land; I challenge you in the cause which Flosi Thord's son has handed over to me.'

"Now all the people spoke out, and said that Mord's suit had come to naught, and all were agreed in this that the defence was better than the prosecution.

"Then Asgrim said to Mord, 'The day is not yet their own, though they think now that they have gained a great step; but now some one shall go to see Thorhall my son, and know what advice he gives us.' Then a trusty messenger was sent to Thorhall, and told him as plainly as he could how far the suit had gone, and how Flosi and his men thought they had brought the finding of the inquest to a deadlock. 'I will so make it out,' says Thorhall, 'that this shall not cause you to lose the suit; and tell them not to believe it, though quirks and quibbles be brought against them, for that wiseacre Eyjolf has now overlooked something. But now thou shalt go back as quickly as thou canst, and say that Mord Valgard's son must go before the court, and take witness that their challenge has come to naught,' and then he told him step by step how they must proceed.

"The messenger came and told them Thorhall's advice.

[4] "Then Mord Valgard's son went to the court and took witness. 'I take witness to this,' said he, 'that I make Eyjolf's challenge void and of none effect; and my ground is, that he challenged them not for their kinship to the true plaintiff, the next of kin, but for their kinship to him who pleaded the suit; I take this witness to myself, and to all those to whom this witness will be of use.' After that he brought that witness before the court. Now he went whither the neighbours sate on the inquest, and bade those to sit down again who had risen up, and said they were rightly called on to share in the finding of the inquest.

"Then all said that Thorhall had done great things, and all thought the presecution better than the defence.

"Then Flosi said to Eyjolf, 'Thinkest thou that this is good law?' 'I think so, surely,' he says, 'and beyond a doubt we overlooked this; but still we will have another trial of strength with them.'

[5] "Then Eyjolf took witness. 'I take witness to this,' said he, 'that I challenge these two men out of the inquest'—here he named them both—'for that sake that they are lodgers, but not householders; I do not allow you two to sit on the inquest, for now a lawful challenge has overtaken you; I challenge you both and set you aside out of the inquest, by the rightful custom of the Al-ting and by the law of the land.' Now Eyjolf said he was much mistaken if that could be shaken; and then all said that the defence was better than the prosecution.

"Now all men praised Eyjolf, and said there was never a man who could cope with him in lawcraft . . . . . .

[6] "Then Mord went to the court and took witness. 'I take witness to this, that I bring to naught Eyjolf Bolverk's son's challenge, for that he has challenged those men out of the inquest who have a lawful right to be there; every man has a right to sit on an inquest of neighbours, who owns three hundreds in land or more, though he may have no dairy-stock; and he too has the same right who lives by dairy-stock worth the same sum, though he leases no land.' Then he brought this witness before the court, and then he went whither the neighbours on the inquest were, and bade them sit down, and said they were rightfully among the inquest.

"Then there was a great shout and cry, and then all men said that Flosi's and Eyjolf's cause was much shaken, and now men were of one mind as to this, that the prosecution was better than the defence.

"Then Flosi said to Eyjolf, 'Can this be law?'

"Eyjolf said he had not wisdom enough to know that for a surety, and then they sent a man to Skapti, the Speaker of the Law, to ask whether it were good law, and he sent them back word that it was surely good law, though few knew it.

[7] "Then this was told to Flosi, and Eyjolf Bolverk's son asked the sons of Sigfus as to the other neighbours who were summoned thither. They said there were four of them who were wrongly summoned; 'for those sit now at home who were nearer neighbours to the spot.'

"Then Eyjolf took witness that he challenged all those four men out of the inquest, and that he did it with lawful form of challenge . . . . . .

"And now it was plain in everything that Flosi and Eyjolf were very boastful; and there was a great cry that now the suit for the burning was quashed, and that again the defence was better than the prosecution.

[8] "Then Asgrim spoke to Mord, 'They know not yet of what to boast ere we have seen my son Thorhall. Njal told me that he had so taught Thorhall law, that he would turn out the best lawyer in Iceland whenever it were put to the proof.' Then a man was sent to Thorhall to tell him how things stood, and of Flosi's and Eyjolf's boasting, and the cry of the people that the suit for the burning was quashed in Mord's hands. 'It will be well for them,' says Thorhall, 'if they get not disgrace from this. Thou shalt go and tell Mord to take witness, and swear an oath, that the greater part of the inquest is rightly summoned'. . . . . Then Mord went to the court, and took witness, and swore an oath that the greater part of the inquest was rightly summoned'. . . . . .

"Then there was a great roar that Mord handled the suit well; but it was said that Flosi and his men betook them only to quibbling and wrong.

"Flosi asked Eyjolf if this could be good law, but he said he could not surely tell, but said the Lawman must settle this knotty point.

"Then Thorkel Geiti's son went on their behalf to tell the Lawman how things stood, and asked whether this were good law that Mord had said.

"'More men are great lawyers now,' says Skapti, 'than I thought. I must tell thee, then, that this is such good law in all points, that there is not a word to say against it; but still I thought that I alone would know this, now that Njal was dead, for he was the only man I ever knew who knew it.'

"Then Thorkel went back to Flosi and Eyjolf, and said that this was good law. . . . . .

[9] "Then the neighbours on Mord's inquest went to the court, and one uttered their finding, but all confirmed it by their consent; and they spoke thus, word for word, 'Mord Valgard's son summoned nine of us thanes on this inquest, but here we stand five of us, but four have been challenged and set aside, and now witness has been borne as to the absence of the four who ought to have uttered this finding along with us, and now we are bound by law to utter our finding. . . . . And now we have all sworn an oath, and found our lawful finding, and are all agreed, and we utter our finding against Flosi, and we say that he is truly guilty in this suit. We nine men on this inquest of neighbours so shapen, utter this our finding before the Eastfirthers' Court over the head of John, as Mord summoned us to do; but this is the finding of all of us.'"

Nearly two thousand years have passed since Tacitus described the Germanic assembly, and one thousand years since Iceland was settled. But the ancient place of Iceland's assembly is still known and venerated;[7] and in June, 1921, when Iceland had once more become independent, and the King of Denmark and Iceland came to grace the national celebration, he was saluted by a blare

XII. 7—View of Tingvallir Today in Iceland
This is the Hill of Laws, the meeting-place of Germanics for a thousand years past

of trumpets as he solemnly ascended the ancient Hill of Laws in the Tingvallir. And in the English Isle of Man (which is still locally independent of the British Parliament, though it lies close in sight of every tourist who steams into Liverpool), all Manx laws must still be proclaimed from the Tynwald Hill;[8] and on July 5 of every year the senior Deemster, or Judge, solemnly reads them aloud from the summit. For the name Tynwald, now borne by the supreme local assembly, is none other than Tingvallir, the old Norse name for the wooded valley of

the assembly; and the popular branch of this Manx Legislature is still known as the House of Keys, that is, the men who have the keys of the law in their bosom,—the old Norse Law-speakers.

4. There were plenty of lawsuits in the old Norse days. But what law there was, rested in tradition only,—that is, in the memory of the Law-speakers. The primitive Germanics had no written laws; they had not even writing. They had somewhere borrowed or invented a

XII. 8—Reading the Laws from the Tynwald
This hill perpetuates in the Isle of Man the tradition of the old Norse Hill of Laws, once known as the Tingvallir, whence laws are proclaimed

crude form of symbols, called "futhorc", or runes.[9] But the meaning of the runes was known only to the leaders; and they were used chiefly for brief inscriptions, on burial stones or on weapons, and in no sense served for literature or records.

But in the second Germanic period we find them everywhere reducing their tribal customs to writing. The Germanic legal system falls into four stages:

CHART OF GERMANIC PERIODS

Date	Stages of Process	Form of Law
—— B. C.	Primitive Location in the North and East	Oral Traditions
A. D. 200		
A. D. 300	The Migrations South and West and	Tribal Codes put into writing
A. D. 800	The New Settlements	
A. D. 900	The Fusion of Races and	Law-Books of
A. D. 1400	The Localization of Law	Local Customary Law
A. D. 1500	Political Nationalization	Roman Law-Books as Common Law

XII. 9—A Runic Inscription
The runes may be seen cut into the face of the upright burial-stone

(II) Second Period

First was that pre-historic period, just described, when they stayed in their northern and eastern homes.

5. Next comes their long period of migration south and west. For centuries the Goths of the east had been making booty-excursions into Roman regions. But about A. D. 300 and extending to A. D. 700, the entire race, retiring before the repeated invasions of fierce Asiatic hordes, migrated west and south, in a series of great treks, into what is now Germany, France, Netherlands,

XII. 10—Map of Germanic Migrations
The winding lines show the paths of the several Germanic peoples as they progressed during their centuries-long treks from the North and East to the South and West

Belgium, England, Scotland, Switzerland, Spain, Portugal, and Italy.[10] There were a dozen different large tribes of them, and we can trace them moving through four centuries—often doubling on their paths, but gradually mastering the entire Romanized regions; at one time plundering, ravaging, and retreating, at another time forcibly occupying, or demanding of the Roman emperors, lands whereon to settle.[11] They intermarried with the original Romanized Kelts, absorbing or absorbed into Roman civilization.

Here they met a softer climate, an easier subsistence, an intellectual religion, and a literature. They now displaced Roman rule, establishing their own political system, and preserving their own legal traditions. By the

XII. 11—Germanics Seeking a Settlement

XII. 12—Map of Germanic Sway

time of Charlemagne, A. D. 800, Western Europe was one Germanic empire.[12] In Spain, Northern Italy, and Southern France, a greater element of Roman institutions of course persisted locally. But the general method of government was Germanic.

The two peculiar features of this stage were, first, that the Germanic law now became "personal", so-called; and,

XII. 13—Lex Salica

This was the first of the tribal codes reduced to writing after the Germanic migrations. This manuscript is now in the monastery of St. Gall, in Switzerland

secondly, that it was now put into writing. It was personal, because each of the newly settled tribes, however mingled locally, continued to live by its own tribal law, and at the same time the original Romanized inhabitants were allowed (for a while) to live by their Roman law. And the Germanic laws were put into writing, because the Germanic settlers now first came into contact with a literature, and first felt the need of clearly formulating their own customs.

6. The Lex Salica, or Code of the Salic Franks, about A. D. 500, is the first of a series of a dozen such Germanic tribal codes, officially compiled by royal order.[13] One of the best MSS. is at the monastery of St. Gall. The first page of the code reads:[d]

[*The Lex Salica.*] "In the name of our Lord Jesus Christ, here begin the Titles of the Salic Code.

Title I. Summons to Court

"If any one is summoned to the court according to the law of the land and comes not, and no excuse detains him, he shall be condemned to a fine of fifteen shillings.

"But he who summons another man and comes not himself, and no excuse detains him, shall pay fifteen shillings to the party summoned. . . .

Title II. Theft of Swine

"If any one steals a sucking pig from the stall, and it is proved on him, he shall be condemned to a fine of three shillings.

"If any one steals a pig who could live without its mother, and it is proved on him, he shall be condemned to a fine of one shilling, ... If any one steals a two-year pig, he shall be condemned in a fine of fifteen shillings,. . . . . ."

It will be noticed that the primitive Salic Code begins almost exactly like the Roman Twelve Tables (*ante*, Chap. VII), i. e. with a rule for summons to the court or assembly; which suggests that the stage of legal ideas here represented was about the same as that of the primitive Romans one thousand years before, though the Salic Code is not even so well arranged as the Roman one. (Lawyers will also note with interest that the word for "excuse", in Title One, is "sunna", which is the same word as "essoin", in early English law-books; the rules for "essoins" of men summoned to jury or court duty form a large part of the earliest law in Bracton's book. This serves to illustrate the common racial bond between English law and Germanic law in general.)

The Code, or Edict, of the Lombards[14], about A. D. 650, who finally settled in Northern Italy, was the nearest of kin to that of the Saxons, who settled in England; and, strangely enough, the potent modern idea of a trust, in Anglican law, has been traced to a peculiar expedient first seen in Lombard law. Lanfranc, the prime minister of William the Conqueror (*post*, Chap. XVI), was by birth a Lombard, who in his youth was recorded in the

XII. 14—The Lombard Code of Rothar

XII. 16—First Gothic Chief Justiciar of Spain

Lombard chronicles as a famous scholar in that law; and it was probably that early learning which enabled him later to grasp readily the related Saxon law, and gained him equal fame in England in some notable lawsuits over the church's rights on Saxon soil.

In Spain, by the second century of West-Gothic rule, about A. D. 650, the laws of the two peoples, Goths and Romans, were amalgamated in a single compilation, the Forum Judicum, or (in Spanish) Fuero Juzgo.[15] The Fuero Juzgo continued to be quoted in Spanish courts into the 1800's, and it was once law in the states of Louisiana, Texas, and California. In the city of Burgos is still shown to the traveler the rude chair of Justice in which sat the first Chief Justiciar under the Gothic dynasty, A. D. 700, as well as a statue of this legendary personage.[16]

In Scandinavia, which was isolated from contact with Romanized civilization, and did not become Christianized

XII. 15—The Fuero Juzgo

This was the code fusing the customs of the Goths with Roman law in Spain. This manuscript is in the Royal Library at Madrid

XII. 18—Charlemagne at His School of the Palace
He instituted the first official system of education for his people

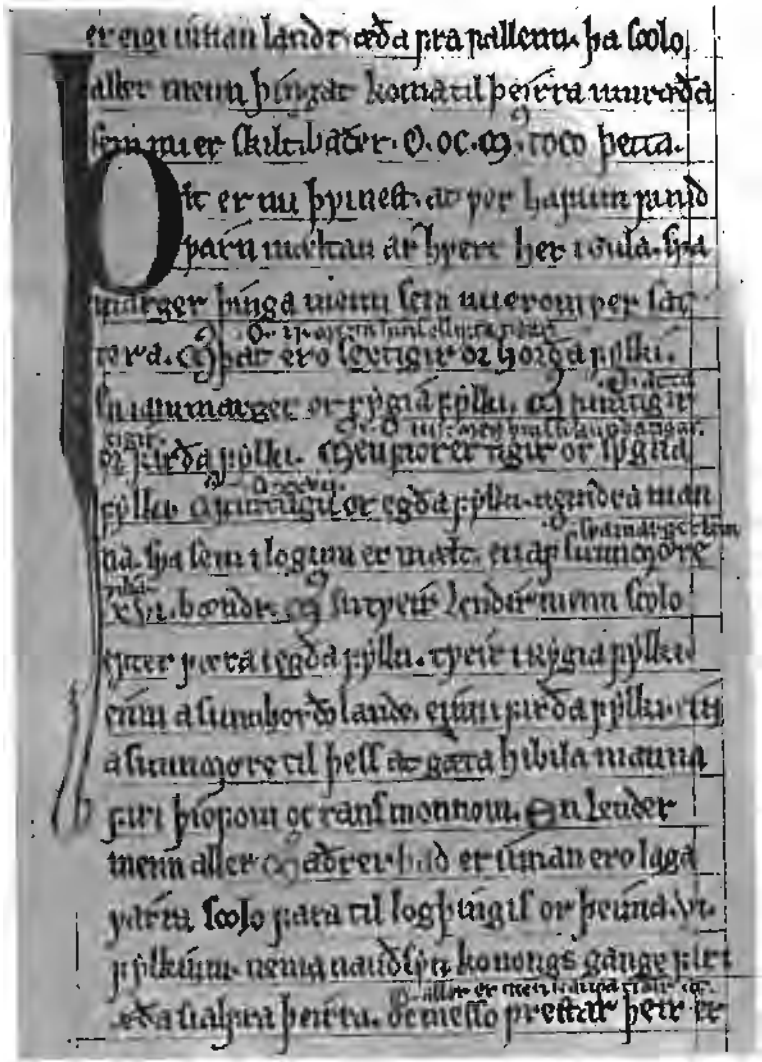
until the tenth century, this phase of reducing the laws to writing did not arrive till about A. D. 1100. But in that century the Gulathing Code was framed for a part of Norway;[17] and this was only one of a copious series of Scandinavian codes formulated in the next two centuries.

But for all the other Germanic peoples the culmination of this second period of Germanic law, the period of the written codes, had come about A. D. 800.

7. This date finds Charlemagne master of the Germanic world,—a great organizer and civilizer, instituting the first official system of written education for his people in their new life,[18] revising the earlier codes of the various peoples under him, and adapting the old democratic popular assembly to the difficult role of a council or parliament in what was now a royal autocracy. Charlemagne's parliament still met in the open air, in old Germanic style. One of Charlemagne's first parliamentary decrees, called capitularies, established a system of sending his personal envoys on circuit to inspect the course of justice, "ad justitias faciendas"; and this method of his served later to develop the Anglican institution of trial by jury.[19]

(III) Third Period

8. The third Germanic stage, from about A. D. 800 to 1400, thus finds the people settled as agriculturists, and a great change gradually takes place. To live together



XII. 17—The Gulathing Code of Norway

XII. 19—Charlemagne Issuing His First Capitulary

One of his earliest decrees sent envoys on circuit to inspect the course of justice, and this led ultimately to the Norman trial by jury

under separate systems of law, personal to each tribe or race, becomes intolerable. Bishop Agobard, of Paris, lamenting at that period the diversity of law, tells us[e] that any five men, a Frank, a Roman, a Lombard, and so on, meeting on the road or at table, might find that no one of them lived under the same law as another.

And so, with settled homes and landed properties, the law now gradually becomes territorial,—that is, uniform for all men within each locality. None were now Goths or Franks or Romans, but Aquitanians, Flemings, Castilians. The feudal system now binds all men to the land. In 1923, a French governmental inquiry revealed one family, LaFargue by name,[20] whose ancestors, probably Germanics, had been tilling the very same land in unbroken continuity for more than eleven centuries, since the first year of Charlemagne's accession.

XII. 20—A Family of 1923 Tilling the Same Ancestral Land for Eleven Centuries

9. But Charlemagne's temporary empire had soon broken up into hundreds of fragments; and we find our-

selves in the presence of a thousand local law-books. A map may attempt to suggest the strange territorial mosaic, in each fragment of which some separate body of law, smaller or larger, was in force.[21] Each feudal lord had the power of justice; the powers differed only in degree,—the high, the middle, and the low (as the phrase ran); the high justice alone having the power to impose the death penalty. In the words of one of the local books of customary law:[22] "The baron has all manner of jurisdiction in his territory, and the king cannot proclaim his command in the baron's land without the baron's consent".

Each region therefore administered, developed, and recorded its own local laws and customs independently, in local codes. We may, to illustrate, juxtapose pages from four samples of such local codes, all in the period of the 1200's,—Harlem, in Holland; Montpellier, in France; Teruel, in Spain; and Dax, in Béarn in Gascony;[23] this customary code of Béarn was the earliest written one in France (though then and for three ensuing centuries Gascony was held by the English crown). Here are some passages illustrative of the style of "Las Costumas e las Franquesas de Montpeylier"; there were 123 sections in all:[24]

XII. 21—Map of the Mosaic of Jurisdictions

XII. 22—Law Codes of Harlem, Montpellier, Dax, and Teruel, in the 1200's

[*The Custumal of Montpellier.*] "III. When men come to lawsuits, they make oath denying fraud or malice; the court asks each party on oath whether to the seneschal or the judge or any of the jurors for that suit he has given or promised money. . . . . .

"VIII. In court a jurist may not be heard to argue, except in a case of his own; and if he argues in his own case, a jurist may argue against him. Nor may advocates be heard, unless the parties consent. In deliberations the prince may have jurists if he wishes; but in lawsuits he must have always a judge. . . . . .

"XIII. A father who marries off a daughter endowed with property or honor, or endows her with property or honor, such daughters cannot afterwards demand anything of the paternal estate, unless the father allows it to them. And if the father has besides one son and one daughter not endowed nor married, and the father dies intestate, the goods of the father go to the son and the daughter not married or endowed. And if one of the married or endowed daughters dies without will and without heirs, her goods go equally between all the brothers and sisters surviving, the father being dead. And if the son or the daughter not married nor endowed die without will and without children, their goods go to the other and his or her children. And if both die without will and without children, their goods go to the married daughters and their heirs. But every person may make a will in his own right.—And the same rule we declare for maternal property. . . .

"XXI. If any one buys from a thief or a non-owner anything stolen or converted or put up at public auction, thinking it in good faith to belong to him who sells, and if afterwards the owner comes and proves property, then the buyer makes oath that he knew it not to be stolen or not owned and that he cannot produce the seller, and then the owner of the thing restores to the buyer only the amount paid for it and recovers the thing. . . . . .

"XXVI. One lawful and competent and reputable witness is believed in suits for movables up to one hundred shillings.

"XXVII. Two lawful and competent witnesses are believed in all cases."

There were literally a thousand of these local law-books,—some three hundred of them in France, as many hundreds in Italy, another hundred or two in Spain, hundreds in Netherlands and Germany and England. Each duchy or principality, each barony, each manor, each town, almost each village, had its own book of law. More than this, each separate class of the community might have its separate body of rules,—clergy, nobles, peasants, townspeople, merchants, artisans.

In any one of the hundreds of local baronial jurisdictions, the every-day course of penal justice may be gathered from the following pen-picture, by a modern scholar who ably combines the knowledge of the historian with the art of the novelist:[h]

[*A Day's Justice in the Barony of St. Aliquis, A. D. 1220:*] "The barons of St. Aliquis acted very nearly like sovereign princes. They, of course, had their own gallows with power of life and death, and even coined a little ill-shapen money with their own superscription. . . . . One of the great duties of a high seigneur is to render justice. It is for that (say learned men) that God grants to him power over thousands of villeins and the right to obedience from nobles of the lower class. Indeed it can be written most

properly that a good baron 'is bound to hear and determine the cause and pleas of his subjects, to ordain to every man his own, to put forth his shield of righteousness to defend the innocent against evildoers and deliver small children and such as be orphans and widows from those that do overset them. He pursues robbers, raiders, thieves, and other evildoers. For this name "lord" is a name of peace and surety.' . . . . . .

"The best of barons only measurably live up to this high standard. Yet Baron Conon of St. Aliquis is not wholly exceptional in telling himself that a reputation for enforcing justice is in the end a surer glory than all the fetes around St. Aliquis. . . . . .

"The laws enforced in the St. Aliquis region are the old customary laws in use ever since the Frankish barbarians' invasions. Many of these laws have never been reduced to writing—at least for local purposes—but sage men know them. There are no professional jurists in the barony. Sire Eustace, the seneschal, understands the regional law better than any other layman around the castle, though he in turn is surpassed by Father Gregoire. The latter has, indeed, a certain knowledge of the Canon law of the Church, far more elaborate than any local territorial system, and he has even turned over the leaves of voluminous parchments of the old Roman law codified by the mighty Emperor Justinian. Up at Paris, round the king there are now trained lawyers, splitters of fine hairs, who say that this Roman law is far more desirable than any local 'customary law', and they are even endeavoring (as the king extends his power) to make the Code of Justinian the basis for the entire law of France. But conditions on most baronies are still pretty simple, the questions to be settled call merely for common sense and a real love of fair play on the part of the judges. One can live prosperously and die piously under rough-and-ready laws administered with great informality.

"Conon has 'high justice' over his vassals and peasants. This means absolute power of life and death over any non-noble on the

seigneury,—unless, indeed the baron should outrage merchants bound to a privileged free city, or some other wayfarers under the specific protection of the king or the Duke of Quelqueparte. If strange noblemen get into trouble, it will depend on circumstances whether Conon undertakes to handle their cases himself, or refers them to his suzerain, the duke. The right of seigneurs to powers of justice on their own lands even over high nobles is, however, tenaciously affirmed, and it is only with difficulty that the duke and, above him, the king can get some cases remitted to their tribunals. If, however, the alleged offender is a monk, he will be handed over to the local abbot or, if a priest, to the bishop of Pontdebois to be dealt with according to the law of the Church.

"Even the lesser sires have 'low justice' with the privilege of clapping villeins in the stocks, flogging, and imprisoning for a considerable time for minor offenses; and robbers caught on their lands in the act of crime can be executed summarily. But serious cases have to go to the court of the baron as high justiciar, as well as all the petty cases which have arisen on the lord's personal dominions. If the litigants are peasants, the wheels of justice move very rapidly. There is a decided absence of formalities.

"A great many disputes go before the provost's court, presided over by Sire Macaire, a knight of the least exalted class, who is Conon's 'first provost'. . . . . One of Sire Macaire's main duties is to chase down offenders, acting as a kind of sheriff, and after that to try them. . . . . Small penalties are handed down every day, but more serious matters must wait for those intervals when Messire Conon calls his noble vassals to his 'plaids' or 'assizes'. Every fief-holder is expected to come and to give his lord good counsel as to what ought to be done, especially if any of the litigants are noble. . . . . .

"However, most St. Aliquis cases concern not the nobles, but only villeins, and with these (thanks be to Heaven!) short shrifts are permitted. The provost can handle the run of crimes when the

baron is busy; but a good seigneur acts as his own judge if possible. Even during the festival period it is needful for Conon to put aside his pleasures one morning to mount the seat of justice. In wintertime the tribunal is, of course, in the great hall, but in such glorious weather a big shade tree in the garden is far preferable. Here the baron occupies a high chair. Sire Eustace sits on a stool at his right, Sire André and another vassal at his left as 'assessors', for no wise lord acts without council. Father Grégoire stands near by, ready to administer oaths on the box of relics; Sire Macaire, the provost, brings up the litigants and acts as a kind of state attorney.

"For the most part it is a sordid, commonplace business. Two villeins dispute the ownership of a yoke of oxen. A peddler from Pontdebois demands payment from a well-to-do farmer for some linen. An old man is resisting the demands of his eldest son that he be put under guardianship: the younger children say that their brother really covets the farm. If the court's decisions are not so wise as Solomon's, they are speedy and probably represent substantial justice.

"But there is more serious business in hand. The news of the fetes of St. Aliquis has been bruited abroad. All the evil spirits of the region have discovered their chance. Certain discharged mercenary soldiers have actually invaded a village, stolen the peasants' corn, pigs, and chickens, insulted their women and crowned their deeds by firing many cottages and setting upon three jongleurs bound for the tourney. They were in the very act of robbing them to their skin when a party of the provost's men, coming up, managed to seize two of these sturdy rascals. . . . . They keep a sullen silence and refuse to betray the lair of their comrades who have escaped. The provost intimates that they may be halegrins, and outlaws of the foulest type, said to violate tombs and devour human flesh. . . . . Such fellows are, of course, food for the crows, but they must not be allowed to get out

of life too easily. 'Let the baron command preparatory torture?' suggests Sire Macaire, with a sinister smile. Conon nods. The two beastlike wretches groan and strain at their fetters. Preparatory torture, they know well, is inflicted both to get a confession of guilt and also to extort details about accomplices. . . . . The miserable pair are not long uncertain about their fate. They have told the truth about the lair of their comrades. The provost's band surprises the spot. Six hardened rogues, in the very act of counting their plunder, are overpowered. But why weary Messire the Baron with the empty form of trying these robbers when there is no mortal doubt of their guilt and no new information is to be extracted from them? Their throats are therefore cut as unceremoniously as the cook's boy attends to pigeons. The next day, wholly casually, Sire Macaire reports his good success to his lord, and remarks, 'I presume, fair Sire, that Denis can hang the two he has in the dungeon.' Conon (just arranging a hawking party) rejoins: 'As soon as the chaplain can shrive them.' Why, again, should the prisoners complain? They are certainly allowed to prepare decently for the next world, a favor entirely denied their comrades.

"If there had been any real doubt as to the guilt of the two bandits, they might in desperation have tried to clear themselves by ordeal. If they could have picked a stone out of a caldron of boiling water, lifted and carried a red-hot iron, or even partaken of the Holy Sacrament (first calling on God to strike them dead if they were guilty), and after such a test seemed none the worse, they might have had some claim to go free. Ordeals are an old Germanic usage. They seem to refer the decision to all-seeing God. But ever since Charlemagne's day they have been falling into disfavor. Great churchmen are ordinarily too intelligent to encourage them. Men learned in the law say that often they wrest justice. Brave knights declare the only ordeal worth having is a duel between two champions. . . . . .

XII. 23—The Mirror of Saxony

This popular law-treatise recorded the common customary law of a wide Germanic region

"Naturally many petty offenses do not deserve death. The criminals are usually too poor to pay fines, and it is a waste of honest folk's bread to let them spend set terms in prison. For small misdemeanants it is often enough to drive the rascals around the neighboring villages in a cart, calling out their names amid hootings and showers of offal. But in the village beyond the Claire is located the pillory for a large class of rogues. . . . . .

"But if a villein has committed a great crime, he were best dismissed from an overtroubled world. Dead men never bother the provost twice. All over France you will find a gallows almost as common a sight in the landscape as a castle, an abbey, or a village. Many a fine spreading tree by the roadway has a skeleton bedangling from one of its limbs. It is a lucky family of peasants which has not had some member thereof hanged, and even then plenty of rogues will die in their beds. Considering the general wickedness abroad, it seems as if there were a perpetual race between the criminals and the hangmen, with the criminals well to the fore."

It was an era of extreme localism in law. Except for a few royal decrees, there was no common national law.

10. The only element of common law was supplied by a few popular treatises, often called Mirrors. The Mirror of Saxony was written by Eike von Repkow, one of the "schoeffen" or lay-judges. In the Dresden MS. the margin was illuminated with crude pictures, suited to the text, on every page.[38] The page here quoted prescribes the method of settling disputes by a legal duel,—trial by battle, in technical English; that "monstrous birth of

ferocity and superstition", Hallam calls it. The following text gives a part of the detailed rules:[1]

[*The Mirror of Saxony.*] "The judge shall give two agents to each party, who shall see that they are fitted out as custom directs. Leather and linen they may put on as much as they wish. Head and feet shall be bare. On the hand they shall have only thin gloves. A naked sword in one hand, and one or two more swords girt at the waist, if they wish. In the other hand, a round shield made only of wood and leather, except the buckle, which may be of iron. And lastly they wear a cloak without sleeves over their outfit. Then for the place of combat a peace-ban is proclaimed on penalty of death, so that none may meddle in the duel. To each the judge assigns a man who bears a pole at the boundary of the combat-place; he shall not meddle with the combatants, except if one falls (then he thrusts his pole between them), or if one is wounded or asks for the spear (but this he cannot do without the judge's consent). As soon as the peace-ban is proclaimed, then the duel is to be fought out according to rules, as guaranteed by the judge. When the judge gives the signal to draw the sword, each shall draw the iron from the sheath. They shall both go before the judge, fitted out as they are, and swear,—the plaintiff, that the charge is true, with which he has charged the defendant; the defendant, that he is guiltless, and may God help him in the fight. The sun shall be equally shared by both, as they go towards each other. . . If the defendant is defeated, judgment shall be against him. If he wins the fight, he shall go free and take the amount deposited for forfeit and penalty."

These treatises purported to record the general rules common to some large region. In the 1200's there were three or four such treatises in French, and three or four in German.

The Mirror of Saxony was followed by a similar treatise, in German, the Mirror of Swabia.[2] The following passage deals with the mode of electing a king:[3]

"How they choose the king. CXXII.

[*The Mirror of Swabia.*] "When they want to choose a king, they must do it at Frankfurt. And if the men do not let the princes into the town, then they may rightly choose him without the town. And when they choose the king, he must give warning to the men who are within the town before he goes forth from the town. . . . .

"Who chooses the king. CXXIII.

"The king must be chosen by three papal princes and four lay princes.

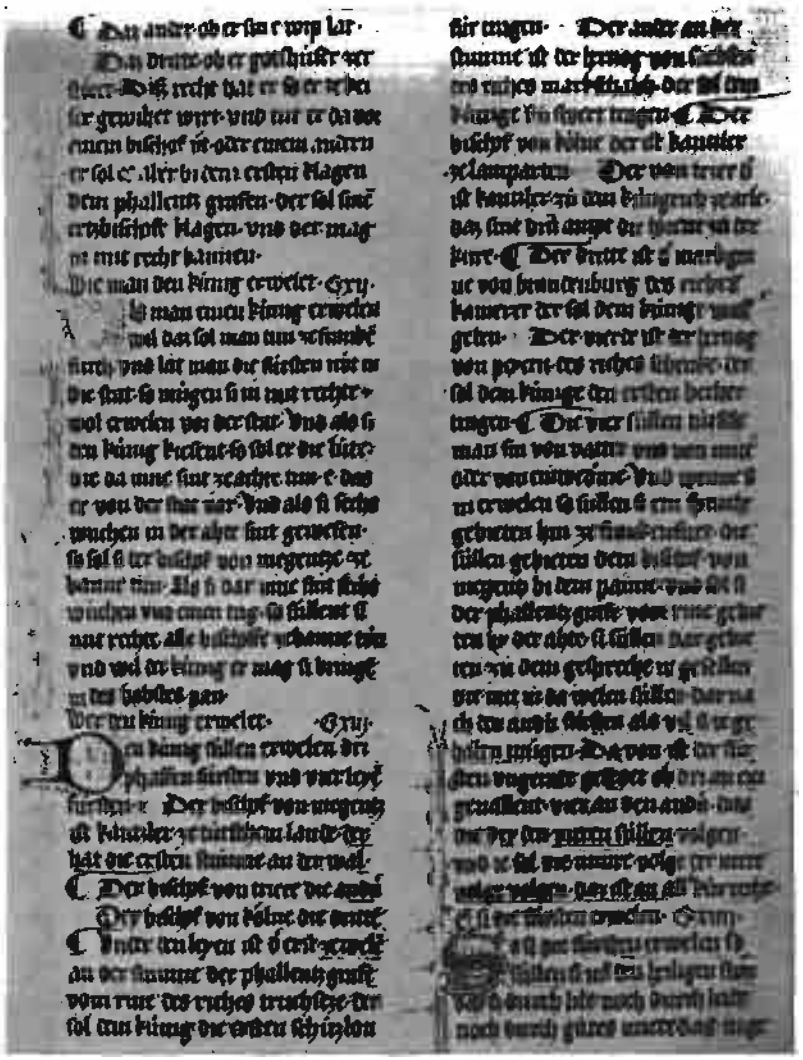
"The bishop of Mainz is chancellor of the German country; he has the first voice in the choice . . . . .

"Among the laymen the first voice in choice is the Palgrave of the Rhine. . . . . .

"These four must be German men by father and by mother or by one of the two."

These passages illustrate the still crude and concrete legal style of the Germanic law-books in this period; and all of these books were of the same type.

11. But they became widely popular; in fact, they were known as the "people's law-books", for they were used by the people. The giving of judgment was still universally the business of the people. In every local court the baron, or seneschal, or sheriff, might preside; but the lay-judges sat with him, to voice the sentiment of



XII. 24—The Mirror of Swabia
The passages quoted are in the left column: "Als man einen kinung erwelen wil, daz sol man tun ze frankenfurth", etc.

popular justice. Here, as formerly at Athens and at Rome, the more primitive custom of doing justice, by the votes of all freemen in the assembly, had become impracticable and had suffered a like evolution. The court was now formed by a small number of freemen representing the entire body. These lay-judges were called "doomsmen" (sometimes) or "jurors" in English, "schoeffen" in German, "échevins" in French, "scabini" in Latin. They were the most respectable men of the people, and under Charlemagne they represented a permanent select list.

It was they, and not the presiding baron, who declared what custom required, and who pronounced the judgment, both on law and fact. "In the medieval Germanic conception, the whole body of the law has latent existence in the consciousness of the people. The judgment thus found, it is the duty of the judgment-finder to declare aloud in the form of an answer to the judge. 'Lord Judge', he says, 'wilt thou hear the law?' And the judge says, 'Yea'. Then says the other, 'I find thee for law that, etc.' . . The judgment, when assented to by all the judgment-finders, or by a majority of them, takes the name of 'collective judgment'. . . The judge then vests it with the property of a binding legal command."*

XII. 25—Trial Court in Session at Prag, A. D. 1536
The baron or seneschal or sheriff might preside; but the lay-judges sat with him and rendered the judgment

11. Schoeffen-Courts

This distinctive feature of the Germanic court,[25] and the general style of these schoeffen-judgments, are illustrated in the following passages,—the first from the Leitmeritz Court, about A. D. 1375, and the last two from the Magdeburg Court, about A. D. 1300-1330. (It would be profitable to compare these crude and untechnical records with the English year-books of the same period (*post*, Chap. XVI); the schoeffen-records resemble rather those of the lower English courts.)

[*Records of the Schoeffen Court.*] [*Schoeffen-Judgment*, No. 5:] "Greetings. Your question in law is this: 'It happened that a child came into a duly held court with his next friends and would choose a guardian for his property. Then we spoke to the friends of the said child asking whether it had come to its full age and how old it might be, that we might pronounce a judgment thereon. They said that he had his full age and is fully competent to choose a guardian for his property, but would not tell us the number of his years, and therefore we pray your wisdom to speak a judgment, as to how old in years a child must be in order to be competent—which we, ourselves, do not know'. Hereupon, we, Schoeffen at Leitmeritz, speak a judgment. Every child, whether boy or maiden, when it has come through its twelfth year, has become competent in point of days and years. This is the judgment according to law."

[*Schoeffen-Judgment*, No. 2:] "Herman had six farms; three of the six he sold to one called Conrad, as they lay on village and field, which the said Herman should plough, sow, and till; and this is what the said Conrad complained, of Herman and his mother, namely, that he had sold him three farms which should be as long and as broad as the neighboring farms above and below; and therein lies the breach, and he asks judgment. Here answers Herman and

acknowledges that he sold to Conrad three farms as they lay on village and field; but Conrad visited the farms and took them as they were without measurement; and Herman asks judgment. Hereupon, etc. Now, since Herman of his six farms sold three to Conrad as they lay on village and field, and Herman still holds the said farms in his possession on Conrad's account, for plowing and tilling and sowing, and now Conrad complains against Herman for that he has received too small farms, so shall the other three farms be measured: if they are greater, as shown by proof, than the farms which were to be ploughed, so shall Herman be bound by fine and pledge to give Conrad full measure as to the farms, so that all six be of like size, and shall also make compensation to him for the crop which might have grown there. But if the farms be of like size, so must Conrad be content with this, provided that Herman will swear upon the Saints that he sold to Conrad three of the six farms as they lay on village and field, and otherwise not. This is the judgment according to law."

[*Schoeffen-Judgment*, No. 41:] "Engelke, the smith, complains of Cordt Roddecker and Claues Dames, jointly, on account of 4 marks (for Engelke is without written reckoning) up to 100 marks [loaned by him to Roden for them], and complains of them and demands answer. Here answer Claues and Cordt and say that their farmer [Roden] lay sick out of the country, and they sent to him two credible persons who were there when he made his testament and said he did not owe more than 70 marks: that sum we well paid to him [the plaintiff], and we say we are not further liable. Hereupon, etc. If Claues and Cordt can prove and establish a paid debt by the oath of three (the principal the third) as is the law, with credible men, possessing full rights, who cannot be impeached, and who know of this fact that Engelke the smith full and all has been paid the debt which he had loaned to them on account of Roden, thereby shall they be freed and loosed from him. This is the judgment according to law."

And in other features, too, the ancient Germanic traditions still prevailed markedly in the pure Germanic regions. Even in the cities the courtrooms were left open on the sides;[26] for, as the Norse God Thor dealt out justice under the great ash-tree, and as the assemblies in Germany had met under oak-trees, and as even Charlemagne's great assemblies were held in the open, so the courts long afterwards continued to be held in the open. The Mirror of Saxony prescribes that court be held from sunrise to sunset; no judgment after sunset was valid; a crude drawing of the 1200's shows the court-officers pointing to the setting sun as limiting their powers; and the tradition that a criminal trial must not last beyond one day persisted in England until

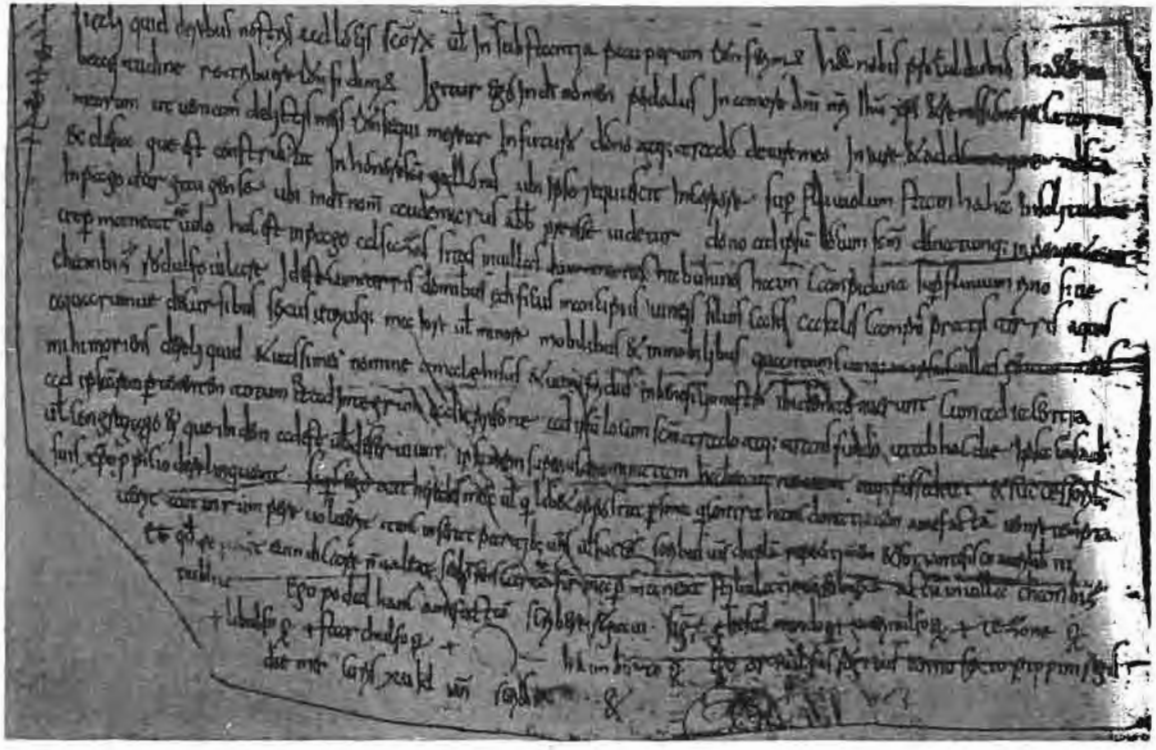
XII. 26—Trial Court in Session

well into the 1700's. The Germanic procedure of the 1200's still recognized a decision by the formal oath of the party's relatives and friends; and the Mirror of Saxony shows a form for giving decision by twenty-one oath-helpers, and has copious rules about compurgation oaths. The various ordeals also were as yet not entirely obsolete, —the ordeal of cold water, for example;[27] one of the practice-books sets forth the form of words to be used in the invocation of divine judgment, and furnishes a picture to show how the immersion should be done.

12. The use of written deeds had spread northwards from Italy; but the deeds were in Latin, and were prepared by a scribe, and usually neither grantor nor grantee could read the document. What education there was lay entirely with the clergy and the monks. Even the great Charlemagne could never learn to use the pen freely. As late as the 1200's few of the nobles and large land-owners could write more than their names; much less could they write Latin. In this deed of A. D. 757,[28] one of the oldest extant deeds north of Italy, the grantor does not even sign his name; the earliest signatures by grantors do not appear till the 1300's.

The deeds, however, had well developed forms, adapted from the notarial system of Italy. The deed above cited reads thus:[m]

XII. 27—The Ordeal of Cold Water



XII. 28—Deed of A. D. 757

In line 3 from below begins the grantor's recital "Ego Podal", etc., then come the witnesses' names with crosses. and then in line 2 the notary records, "Ego Arnulfus requisitus anno sexto pippini regis die mercurii sexto januarii scripsi"

[*Deed from Podal to the Monastery of St. Gall, A. D. 757.*] "I, Podal, for the love of our Lord Jesus Christ and for the remission of my sins, so as to merit pardon in future for my wrongdoings, do give and deliver out of my right and into the right and dominion of the holy church of St. Gall, to remain there perpetually, my estates in . . . . [naming three towns], that is to say, with lands, dwellings, buildings, fixtures, vines, forests, fields, meadows, lands, waters still and running, greater or less, movables and immovables, such as my father on his death left to me. . . . . If I or my heirs or any adverse person should attempt to annul this gift made by me, then let him pay to you or your successors double the claim and take nothing by his claim, and let this present deed remain valid. Done at the estate of Chambiz in public. I Podal have requested the writing of this deed made by me."

[Six witnesses sign by a cross]

"I Arnulf [a scribe] on request have written and subscribed this on Wednesday 6th January, 6th year of King Pippin's reign."

Thus the scribe wrote the deed at the grantor's request. The conveyancing was chiefly in the hands of the monks. They had come to own possibly one-half of all the lands in Christian Europe, through numberless pious bequests, and they were naturally expert conveyancers. The deed just quoted was a gift of three large estates to the Monastery of St. Gall, in Switzerland; the superb library of that monastery well repays a visit; for its archives today are still the greatest repository of old deeds in Europe north of Italy.

(IV) Fourth Period

13. The fourth and last period of the Germanic system—that is, from A. D. 1400 onward—is a period of transformation by Roman, Maritime, and Papal law.

The pure Germanic race (and this includes, of course, the Northmen, the Anglo-Saxons, the Lombards, the Teutons, and the Franks, who have helped to build six or seven modern nations) was not ordinarily inventive, socially or politically. In the phrase of a modern historian, the Germanic race, beginning as plunderers, progressed as borrowers, and brought to high perfection the intellectual goods which it had borrowed.[a] Always, for stimulus, the Germanics needed contact with an older and subtler civilization. For lack of political constructiveness, the Germanic legal system had been of slow growth. At the end of seven centuries from the Salic Code, and after ample contact with Latin literary stimulus, they had developed nothing better than the Mirror of Saxony, whose still crude style we have seen; and yet in a similar period of seven hundred years the Romans had progressed from the crude Twelve Tables to the imperishable science of Gaius and Ulpian.

And so the Germanic system, in its fourth period, disappears, by transfusion, into another and new one.

What happened was that, alongside of it, for three centuries past or more, had been growing up three other legal systems,—the universal Maritime law, the universal Church law, and the universal Romanesque law,—all of them independent of any race or territory. The last two were the most extensive and influential. And learned doctors of Roman and Canon law now took the place of the shrewd old Germanic "schoeffen" on the bench. The subtle bookish law of Justinian, revived since A. D. 1100 in the universities, and the efficient procedure of the Church courts, devised by able administrators, gradually supplanted the popular customs, the simple rules of thumb, and the crude procedure of the Germanic system.

XII. 29—The Imperial Chamber of Justice

And when in A. D. 1495, the Emperor Maximilian,

who was filled with the old obsession that he was the successor of the Roman Caesars, established the Imperial Chamber of Justice,[19] as a central court of appeal, and provided that one-half of its sixteen judges should always be learned doctors of the new Romanesque law, the sun was setting on the power of the old Germanic "schoeffen", or lay-judges, in Germany, their last stronghold; and the doom of the pure Germanic legal system was sealed.

We must now turn back many centuries to outline the rise and spread of these other three systems,—the Sea-law, the Papal law, and the Romanesque law.

Sources of Illustrations

1. *A Viking Chieftain.* From a lithograph, artist unidentified, furnished by Thos. Cook & Sons, Advertising Department, London, 1923.
2. *Forsete, God of Justice.* From the illustration in *Clement B. Shaw*, "Tegner's Frithiof's Saga, translated," p. 292 (Chicago, 1908).
3. *A Norse Earl in His Hall.* From the illustration in *Shaw*, p. 57 (cited *supra*).
4. *The Hill of Laws.* From the illustration in *Shaw*, p. 127 (cited *supra*).
5. *A Lawsuit at the Ting.* From the illustration in *Shaw*, p. 81 (cited *supra*).
6. *The Assembly Clashes Its Approval.* From the illustration in *Shaw*, p. 297 (cited *supra*).
7. *View of Thingvallir Today in Iceland.* From a photograph furnished by *Halldor Hermannson*, curator of the Fiske Collection in Cornell University Library, 1924.
8. *Reading the Laws from the Tynwald.* From the photograph by *Stone*, in *Geo. C. Williamson*, "Curious Survivals", p. 98 (London, Jenkins, 1923).
9. *Runic Inscription.* From the engraving in *G. Stephens*, "Handbook of the Old Northern Runic Monuments of Scandinavia and England", p. 53 (London, Williams & Norgate, 1884).
10. *Map of Germanic Migrations.* From the map in *Keith Johnston*, "The World Classical Atlas", plate 23 (Edinburgh, W. & A. K. Johnston, n. d.)
11. *Germanics Seeking a Settlement.* From the illustration by *A. de Neuville*, in Guizot's "History of France", transl. Black, vol. I, p. 128 (Boston, Estes & Lauriat, n. d.)
12. *Map of Germanic Sway.* Prepared by the author.
13. *Lex Salica MS.* From the facsimile in *Henne am Rhyn* (librarian at the Monastery of St. Gall), "Kulturgeschichte des deutchen Volkes", vol. I, p. 73 (Berlin, Grote, 2 vols. 1886).
14. *Lombard Code of Rothar.* From the facsimile in *Henne am Rhyn*, I, 72 (cited *supra*).
15. *Fuero Juzgo.* From an illuminated facsimile made from the original for the author by the Librarian of the Royal Library at Madrid, 1913.

16. *First Gothic Chief Justiciar of Spain.* From a photograph of the statue, furnished by the Royal Bureau of Engraving, Madrid.
17. *Gulathing Code.* From the facsimile in "Norges Gamle Lov", 1st series, ed. *Storm*, vol. IV, at end (1885).
18. *Charlemagne at his School of the Palace.* From the illustration by *A. de Neuville*, in *Guizot*, I, 246 (cited *supra*).
19. *Charlemagne Issuing his First Capitulary.* From a photograph taken for the author by *Giraudon*, Paris, from the painting by *Ary Scheffer*, in the National Gallery at Versailles.
20. *A Family of 1923 Tilling the Same Ancestral Land for Eleven Centuries.* From the Rotograph photograph in the *New York Times*, for Sunday, 1924.
21. *Map of the Mosaic of Jurisdictions.* Prepared by the author.
22. *Law Codes of Harlem, Montpellier, Dax, and Teruel.* From facsimiles in the reprints of the Keurboek of Harlem (1887), Le Petit Thalamus of Montpellier (1840), Le Livre Noir et Etablissements de Dax (1902), and Forum Turolii (1905), in the Elbert H. Gary Library of Law.
23. *Mirror of Saxony.* From the facsimile edition by *Karl von Amira*, "Die Dresdener Bilderhandschrift der Sachsenspiegel", p. 38 (Leipzig, Karl W. Hiersemann, 2 vols., 1902).
24. *Mirror of Swabia.* From the facsimile in *F. Steffens*, "Lateinische Palaeographie", plate 111 (Trier, Schaar, 2d ed., 1909).
25. *Trial Court in Session at Prag, A. D. 1536.* From an engraving by *C. Hennig*, in the "Chronik von Böhmen" (Prag, 1852).
26. *Trial Court in Session.* From the engraving in *Konrad von Maurer*, "Geschichte des altgermanischen. . . . . Gerichtsverfahren", p. 362, Appendix A (Heidelberg, 1824).
27. *Ordeal of Cold Water.* From the facsimile in "Monumenta Germaniae Historiae", 4to ed., Sectio V, ed. *Zeumer*, "Formulae", fol. 64, p. 672.
28. *Deed of A. D. 757.* From the facsimile in *Steffens*, plate 38 (cited *supra*).
29. *Imperial Chamber of Justice.* From the engraving in *von Maurer*, p. 362, App. C (cited *supra*).

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a. Gragas. Translated from the edition of *V. Finsen* (Kopenhagen, 1852), "Gragas", cap. 117; Icelandic text in Part I, page 216, modern Danish text in Part III, p. 215.

b. Tacitus, "Germania", c. 11: "Si displicuit sententia, fremitu adspernantur; sin placuit, frameas concutient." Compare Homer's description, in chap. VI, *ante*.

c. Njal's Saga. From the translation in Sir *George Webbe Dasent*, "The Story of Burnt Njal", c. 140 (2 vols. 1869; reprint by J. M. Dent, London, and E. P. Dutton, New York, Everyman Series).

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k. Schoeffen-formula. From the Richtsteig Landrecht, as quoted in *Engelmann*, transl. *Millar*, "History of Continental Civil Procedure", p. 145 (1927).

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m. Deed of A. D. 757. Translated from the text in *Steffens*, cited *supra*.

n. See this opinion as phrased by *T. Peisker*, in "Cambridge Medieval History", vol. II, c. XIV, p. 433.

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